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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

ARMCO STEEL CORPORATION,
Appellant,
vs.
STATE OF MICHIGAN, DEPARTMENT OF REVENUE
and CLARENCE W. LOCK, Commissioner
(substituted for Louis M. Nims),
Appellees

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellant appeals from a final decision of the Supreme Court of Michigan affirming a final decision of the Circuit Court of Wayne County, Michigan, and submits this statement for the purpose of showing the basis upon which this Court has jurisdiction of this appeal and that the federal questions presented are substantial.

(a) THE OPINIONS BELOW

The opinion of the Circuit Court for the County of Wayne, State of Michigan, is not reported. The opinion of the Michigan Supreme Court is reported in 359 Mich. 430, 102 N. W. 2d 552. Copies of these opinions are attached hereto as Appendices A and B respectively.

(b) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) Nature of proceedings and the statute pursuant to which it is brought: This is an action in Assumpsit brought July 12, 1956 in the Wayne Circuit Court pursuant to Section 12 of Act 150, Michigan Public Acts of 1953, as amended (C. L. 1948, Sec. 205.562; M. S. A. Sec. 7.557(12)), to recover taxes paid under protest by appellant Armco Steel Corporation. Suit was started by declaration and rule to plead. An amended declaration (thereafter the basis for this proceeding), answer thereto and reply were filed. Appellees filed a motion for summary judgment of no cause of action on the pleadings. On February 16, 1959, the Circuit Court for Wayne County filed its opinion on motion for summary judgment, and on February 18 an order was entered granting appellees' motion for summary judgment of no cause of action on the pleadings. Appellant appealed to the Michigan Supreme Court and on April 11, 1960 that Court affirmed the order of the Circuit Court. The action herein described is the method provided by the act involved for recovery of taxes paid.

(ii) Judgment to be reviewed: The Supreme Court of Michigan rendered its decision on April 11, 1960. Notice of appeal to this Court was filed by appellant on July 8, 1960 with the Clerk of the Circuit Court for Wayne County, Michigan, to which the record in this cause had been returned by the Supreme Court of Michigan.

(iii) The statutory provision believed to confer jurisdiction of this appeal on the Supreme Court of the United States is 62 Stat. 929; 28 U.S.C.A. 1257 (2).

(iv) A few of the many cases believed to sustain the jurisdiction of this Court on appeal are *Northwestern*

States Portland Cement Company v. State of Minnesota, 358 U. S. 450 (1959); 3 L. ed. 2d 421; *Railway Express Co. v. Virginia*, 358 U. S. 434, 3 L. ed. 2d 450 (1959); *Memphis Steam Laundry v. Stone*, 342 U. S. 389 (1952); *Freeman v. Hewit*, 329 U. S. 249, 91 L. ed. 265 (1946) (p. 213); *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 328, 88 L. ed. 1304 (1944); *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. ed. 272 (1939); *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365 (1938); *Hans Rees' Sons, Inc. v. North Carolina ex rel.*, 283 U. S. 123, 75 L. ed. 879 (1931); *Dahnke Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239 (1921).

(v) State statute involved: The validity of Act 150 of the Michigan Public Acts of 1953,[1] as amended by Act 282 of Public Acts of 1955 (Michigan Compiled Laws 1948, Vol. 5A Part I, page 573, Sections 205.551 et seq.; Michigan Statutes Annotated Cumulative Supplement Vol. 6, page 154,[2] Sec. 7.5571(1) *et seq.*), is involved in this case. The particular sections of that act that bear on the questions herein presented are Sec. 1(e)(f)(h)(i)(j) and (l), Sec. (2b), Sec. 3 (a) and (b), Sec. 4 (a) and (b), and Sec. 12. Said sections are lengthy and the parts thereof material to this appeal are set forth in Appendix C attached hereto at pages 39a through 42a.

---

[1] The provisions of this act prior to the amendment effective July 1, 1955 (Act 282 P. A. 1955), although drawn into issue in the lower courts, are no longer in dispute, the parties having eliminated by agreement questions peculiar to this act as it existed prior to July 1, 1955.

[2] The act in question as it appears in the 1959 Cumulative Supplement citation above contains some amended language resulting from amendments subsequent to the period in question. Such amended language is not material to the questions here involved.

(c) THE QUESTIONS PRESENTED

1. Whether the State of Michigan has the power, consistent with the commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3), to levy a tax on that portion of a foreign manufacturing corporation's gross receipts determined by application of a property-payroll-sales formula to 50% of the corporation's gross receipts from all sales, no part of said sales being intra-Michigan sales and the majority of which sales do not involve the State of Michigan in any respect, where said foreign manufacturing corporation's only connection with the State of Michigan arises out of the maintenance of a sales office and activities incident to the solicitation of orders therein for interstate sales.

2. Whether a Michigan tax on that portion of a foreign manufacturing corporation's gross receipts from all sales determined by application of a property-payroll-sales formula to 50% of the corporation's gross receipts from all sales, none of which are intra-Michigan sales and the majority of which do not involve the State of Michigan in any respect, and where the foreign manufacturing corporation's only connection with the State of Michigan arises out of the maintenance of a sales office and activities incident to the solicitation within Michigan of orders for interstate sales, taxes activities and transactions of the corporation taking place beyond the State's jurisdiction contrary to the due process guaranty of Article XIV, Section 1, of the Amendments to the United States Constitution.

(d) STATEMENT OF THE CASE

1. Facts material to the consideration of the questions presented.

Since the judgment under consideration was entered on the pleadings without trial the facts are to be found in the pleadings and the affidavit of merits in opposition to the motion for summary judgment, and such parts of said motion for summary judgment and affidavits in support thereof as are not denied by said affidavit of merits.

The nature of appellant's activities are alleged in appellant's amended declaration and particularly Count III thereof dealing with the statute as it exists subsequent to July 1, 1955. Appellant is and at all times mentioned herein has been an Ohio corporation, with its principal place of business in Middletown, Ohio. It is and at all relevant times has been engaged in the production, manufacture and sale of various types of steel and steel products, all aspects of which production, manufacture and sale, from the smelting of ore through fabrication of steel products and the storing and shipment of the same (except for the solicitation of orders for sale as herein outlined and the inseparable incidents thereof), are conducted in their entirety outside of the State of Michigan.

Appellant is not qualified to do business in Michigan, but has maintained and maintains a sales office in Detroit and a branch of that office in Grand Rapids, Michigan. The Detroit sales office and its branch are maintained solely for convenience in the solicitation of orders for its products. Appellant rents the premises it occupies in Michigan; it owns office furniture of a nominal value in the sales office and its branch, and maintains a bank account in Michigan for convenience in connection with petty expenses of the Detroit sales office.

Appellant employs five salesmen and eight clerks in Michigan; the sole responsibility and authority of the salesmen is to solicit orders for Armco's products. Orders are submitted to appellant's principal offices in Middletown, Ohio, for acceptance or rejection. The sole duties of the clerks in Michigan are to facilitate the work of the salesmen and to process the orders obtained by them.

Appellant has never engaged in Michigan in mining, manufacturing, processing or any activity other than as aforesaid in connection with the sale of its products in Michigan, nor has it ever maintained any inventory in the State. All of its sales to Michigan customers are shipped f.o.b. points outside of the state, and payments by Michigan customers are made directly to its principal office in Middletown, Ohio.

It further appears (Schedule B of Exhibit B to appellant's amended declaration) that during the period from July 1, 1955 through December 31, 1955 Armco's gross receipts from its entire operations everywhere amounted to $328,667,886.00. Its gross receipts from sales of tangible personal property located outside Michigan at the time of receipt of or appropriation to the orders, where shipment was made to points within Michigan were $24,193,049.76.

The receipts from sales of goods shipped into Michigan during the period in question were the only receipts of Armco related in any manner to its activity within the State of Michigan. As stated, this relationship results solely from solicitation activities and the fact that the goods were shipped f.o.b. points outside Michigan by common carrier into Michigan.

Appellant further alleges in its amended declaration that appellees in their administration of the statute under consideration construe the phrase "gross receipts" to mean "the entire amount received or to be received in money, credits, property or other money's worth from an activity carried on for gain, benefit or advantage," regardless of whether that activity is carried on wholly or partially without the State of Michigan.

The following additional facts deemed material appear in the affidavit of merits of Murray B. Wilson, Central Area Sales Manager of appellant, filed in opposition to appellees' Motion for Summary Judgment.

The principal offices and largest concentration of operating plants and facilities of Armco are in Middletown, Ohio, consisting of 76 coke ovens, 11 open hearth furnaces, 2 electric furnaces, a blast furnace, a rolling mill and 2 fabricating plants. Also in Middletown are the administrative and executive offices of the corporation. It also owns and operates large installations in Ashland, Kentucky, Butler, Pennsylvania, and in Hamilton and Zanesville, Ohio. It has an installation in Houston, Texas, almost as large as that in Middletown, and substantial installations in Kansas City, Missouri, and Sand Springs, Oklahoma. The corporation owns ore resources in Labrador, Canada, in the Mesabi Range in Minnesota, and in Texas. It owns coal resources in West Virginia and Oklahoma. It owns no property in Michigan except the office furniture, equipment and supplies as aforesaid.

It produces a wide variety of steel and steel products, which it sells throughout the United States through sales offices in twenty-six cities throughout the country. Its entire production, manufacturing and administrative opera-

tions take place entirely outside the State of Michigan; all its products are sold f.o.b the plants where they are produced.

Only 13 of the corporation's more than 31,000 employees are employed in Michigan; their compensation is less than one-tenth of one percent of the corporation's payroll; the value of its property in Michigan is less than 1/40,000 of its total property.

The job of the salesmen is to solicit orders for the sale of the company's products. As an incident in the processing of such orders, they also discuss adjustments that may arise with respect to performance of steel which has been delivered. Such decisions involve less than 1% of the steel purchased from Armco by Michigan customers. The salesmen in Michigan are in the charge of a district sales manager, who reports directly to the Central Area Manager in Middletown, Ohio. There is an office manager in the Detroit office in general charge of clerical work, the mechanical aspects of correspondence and related matters.

Technically trained personnel of the corporation, known as mill representatives, are frequently in Michigan, as an adjunct to the sales force having special technical knowledge. In connection with complaints with respect to malfunction of steel by a customer, the mill representative in company with a salesman, decides on behalf of Armco whether the complaint is justified. All adjustments resulting from justified complaints, both as to type of adjustment and the amount, are made in Middletown, Ohio. Such adjustments concern approximately ½ of one percent of plaintiff's product shipped into Michigan.

There are sporadic and infrequent trips to Michigan by other Armco personnel in the nature of goodwill or courtesy calls, or appearances at showings of products made by

appellant's customers in whole or in part from Armco steel.

Appellees filed affidavits in support of their Motion for Summary Judgment alleging Michigan activity of appellant's employees in minute detail. This detail was characterized in the Affidavit of Merits filed by appellant as "a detailed and misleading characterization of the nature and extent of Armco's Michigan activities". The Michigan Supreme Court recounts such minute detail in its opinion (pp. 17a to 23a of Appendix B hereto). The Michigan Court made no determination that appellant's Michigan activities were other than activities in interstate commerce.

Notwithstanding appellant's claim that its activities in the State of Michigan were purely incidental to and inseparable from interstate commerce and immune from taxation by the State of Michigan, the appellees State of Michigan and Department of Revenue through Louis M. Nims, predecessor of appellee Clarence W. Lock, insisted that appellant was subject to the tax in question and threatened to assess a tax and penalties against appellant. To avoid the threatened penalties appellant filed tax returns, Exhibits A and B to appellant's amended declaration and appellees thereupon assessed the tax herein complained of. In the assessment, Exhibit C to appellant's amended declaration, the sum of $27,146.31 represents tax computed for the period from July 1, 1955 to December 31, 1955. Appellees, in the computation of the tax assessed for the period, included in the tax base from which the 50% of gross receipts was determined and to which the three-factor apportionment formula was applied, appellant's receipts from all sources including $324,474,837.00 of receipts having no connection whatsoever with the State of Michigan. Appellant paid the resulting tax under protest

and brought the subject action to recover the same in accordance with the provisions of Section 12 of the act in question. That action thereafter followed the course outlined under "grounds on which jurisdiction of this Court is invoked" related above.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The constitutional questions here presented were specifically raised in the pleadings, appellant having alleged in its amended declaration (pp. 13-14) that:

> "9. The defendants have construed and applied the Business Activities Tax as amended by Act No. 282 of the Public Acts of 1955 in such a manner as to render it unconstitutional or said act in itself is unconstitutional when applied to the plaintiff for the following reasons:
>
> (a) The application of a Michigan tax to the plaintiff's receipts from sales or activities incident to sales in interstate commerce imposes a tax on interstate commerce in violation of the Commerce Clause, Article I, Section 8, of the Constitution of the United States of America.
>
> (b) The application of a tax by the State of Michigan to plaintiff's receipts from transactions, events and activities occurring outside its territorial borders, deprives plaintiff of its property without due process of law in violation of the due process clauses of Article XIV, Section 1, Amendments to the United States Constitution, and Article II, Section 16 of the Constitution of the State of Michigan.
>
> (c) The formula of Section 3(b)(1) of the Business Activities Tax as amended by Act 282 of the Public Acts of 1955, effective July 1, 1955,

> for determining the adjusted receipts of a taxpayer derived from or attributable to Michigan sources and subject to tax, is arbitrary, unjust and discriminatory in its application to the plaintiffs in that the plaintiff's adjusted receipts and the resulting tax thereon, in effect, are computed from plaintiff's total receipts from sales of its products both within and without the State of Michigan reduced by 50% and then not allocated but merely diminished by the so-called three-factor formula, one of which factors contains the very receipts from sales which the formula purports to allocate, all without regard to the actual ratio of activity incident to such receipts within and without the State of Michigan, contrary to the due process clauses of Article XIV, Section 1, Amendments to the United States Constitution * * *."

The Circuit Court of Wayne County expressly held that said act was valid as applied to appellant (p. 14a, Appendix A).

The issues were expressly raised on appeal to the Michigan Supreme Court as follows:

> "I. Is the tax imposed by Act 150 P. A. 1953, as originally enacted and as amended, and as applied by Appellee to Appellant, a direct tax on interstate commerce, forbidden by Article I, Sec. 8, United States Constitution?"
>
> "II. Does the Act as applied by Appellees to Appellant tax in whole or in part Appellant's activities and transactions taking place outside the jurisdiction of Michigan contrary to due process guarantees?"

The questions were squarely passed upon by the Supreme Court of the State of Michigan in its decision. See page 25a, Appendix B, where the Michigan Supreme Court posed

the question, "Is the interstate Commerce Clause, U. S. Constitution, Article I, Section 8, offended by this tax as applied to plaintiff's business activities?", and page 31a, where the Michigan Supreme Court posed the questions "Is the tax as applied to plaintiff here, violative of due process for extraterritoriality?" "Does it tax transactions, events or activities beyond Michigan's borders?" "Does it attribute to taxable activity within Michigan's borders an unreasonable and arbitrary portion of plaintiff's activities elsewhere?" The Court answered all of these questions in the negative.

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This Court's historic concern with the protection of interstate commerce from undue interference by the various states and prevention of infringement of due process guarantees reflected in the great number of cases it has considered on the subject are evidence of the importance and the substantialty of the general subject matter of this case. It is respectfully submitted that the federal questions in this particular case are important and substantial because:

1. The decision of the Supreme Court of Michigan is in conflict with previous decisions of this Court.

2. The effect of the decision in this case is not limited to the parties.

3. The constant search by the States for new methods of taxing the flow of interstate commerce requires constant judicial supervision and the extension by this case of State power far beyond limits previously set should have the benefit of this Court's plenary consideration with briefs on the merits and oral argument.

1. The decision of the Supreme Court of Michigan is in conflict with previous decisions of this Court.

Appellant's claim that the tax in question violates the constitutional guarantees heretofore mentioned should be examined in light of the actual results of the statute as it is applied to appellant.

Because the specific deductions permitted appellant for determining "adjusted receipts" or "income" do not equal 50% of its gross receipts its adjusted receipts are arbitrarily fixed by the statute at 50% of gross receipts. Bearing in mind that the Michigan Court construes the term "gross receipts" to mean receipts from all soufces and not just receipts derived from or attributable to Michigan sources, it is clear that the tax base (adjusted receipts to which the apportionment formula is applied) is 50% of gross receipts. It is obvious that a tax on 50% of gross receipts cannot be distinguished constitutionally from a tax on 100%. Any practical distinction would be easily eliminated by doubling the rate. A 2% tax on 50% of gross receipts is indistinguishable from a 1% tax on 100% of gross receipts. Clearly for taxpayers such as appellant, whose allowable deductions are less than 50% of gross receipts and whose "income" or "adjusted receipts" therefore are fixed arbitrarily at 50% of gross receipts this tax is indistinguishable in effect from a tax on total gross receipts.

Furthermore, there is here no local activity separate and distinct from interstate commerce such as supported the taxes in cases relied on by the Michigan Court in sustaining this tax, e.g. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 82 L. ed. 823 (1938) (publishing); *B. F. Goodrich Company v. Washington*, 38 Wash. 2d 663, 231 P. 2d 325, *cert. den.* 342 U.S. 876, 96 L. ed. 659 (local retail and wholesale outlets with warehouses).

Although the Michigan Court dwelt at length on the nature and extent of appellant's activities in Michigan, it is significant that it made no express holding that the activity was of a local nature sufficiently separable from interstate commerce to support a *direct* tax. Appellant's Michigan activities are of the nature assumed without argument in *Northwestern States Portland Cement Co. v. Minnesota, supra,* to be "interstate" rather than "local" in nature.

Finally, it is submitted that the decisions of this Court have uniformly been to the effect that a direct state tax on interstate commerce is forbidden by the commerce clause and that a state tax on the gross receipts from interstate commerce is indistinguishable from a direct tax on that commerce.

With these propositions in mind it is appellant's claim that the decision of the Michigan Court is in conflict with the substance of every case that has denied a state's power to tax interstate commerce or the receipts therefrom.

The United States Supreme Court has painstakingly through the years labored to establish distinctions and the importance of such distinctions in the incidence of state taxes, i. e., whether a tax is on "local" activities and measured by receipts reasonably resulting from such activities or is a direct tax on the receipts themselves and consequently a forbidden direct tax on the commerce giving rise to such receipts.

Likewise, this Court has heretofore carefully established the reasons why a state tax on "net income" resulting from activities within a taxing state is sustainable even though those activities are in interstate commerce.

The decision in the subject case ignores the careful distinctions made. It characterizes the tax as "a tax on

Michigan activities" (pp. 25a, 31a, 32a), where convenient to do so and as "an income tax" (pp. 28a, 30a, 31a) where nesessary to support the progress of the decision. By this method the Michigan court reaches the conclusion that this tax does not violate the commerce clause because it is a tax on local activity and at the same time it does not violate the due process clause because it is similar to a tax on apportioned net income. It is respectfully submitted that logic requires that this tax be sustained either as a tax on "local activity" or a tax on "apportioned net income" and that in fact it cannot be sustained on either basis.

Unless it can be said that an apportionment formula, such as here involved, automatically avoids the illegality of a tax on interstate activities or the receipts therefrom, the Court's decision is directly contrary to cases such as *State Freight Tax Cases* 15 Wall. 232, 21 L. ed. 146; *Nippert v. Richmond*, 327 U.S. 416, 90 L. ed. 760 (1946); *Freeman v. Hewit*, 329 U.S. 249, 91 L. ed. 265 (1946); *J. D. Adams v. Storen*, 304 U.S. 307, 82 L. ed. 1365 (1938); *Puget Soand Stevedoring Company v. Tax Commission*, 302 U.S. 90, 82 L. ed. 68 (1937); *Fisher's Blend Station v. State Tax Commission*, 297 U.S. 650, 80 L. ed. 956 (1936); *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 83 L. ed. 272 (1932); *Alpha Portland Cement Co. v. Mass.*, 268 U.S. 203, 69 L. ed. 916 (1924); *Cheney Brothers v. Mass.*, 246 U.S. 147, 62 L. ed. 632 (1918); *Crew Levick Co. v. Pa.*, 245 U.S. 292, 62 L. ed. 295 (1917); *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 56 L. ed. 445 (1912); *United Airlines v. Joseph*, 282 App. Div. 48 (1953); *United Piece Dye Works v. Joseph*, 282 App. Div. 60 (1953), *cert. den.* 348 U.S. 916.

This Court has never sanctioned the division of receipts from a sale betwen two states. It is all (*McGoldrick v.*

Berwind-White Coal Mining Co., 309 U.S. 33, 84 L. ed. 565 (1940)), or none (*McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 88 L. ed. 1304 (1944)), depending on whether the local activity was sufficient to sustain a tax on the entire receipts of the transaction. It is respectfully submitted that the Michigan Court in sustaining the instant tax on the basis that it was "apportioned", relying on such cases as *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 82 L. ed. 823 (1938) and *Central Greyhound Lines v. Mealy*, 334 U.S. 653, 92 L. ed. 1633, imported a new concept not attributed to that word by those cases.

If a state can tax a part of the receipts of an interstate sale on the basis of solicitation, interstate commerce is exposed to the danger of multiple burden in view of the established principle that given clearly local activity a state can tax the entire proceeds, as for example, by a tax on the local activity of manufacturing, *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084 (1919); or the local activity of publishing, *Western Live Stock v. Bureau of Revenue, supra.*

The question is clearly posed as to whether a forbidden tax base can be legitimized by applying the tax to a fixed percentage of the forbidden base.

Except for the details of the apportionment formula the division of receipts in the manner attempted by this statute was forbidden in *Meyer v. Wells, Fargo & Co., supra.*

Whether cases which heretofore have been held to approve taxes *on local separable* activities measured by receipts from transactions involving only those activities are support for tax on a part of receipts from transactions unrelated to the local activities is a question that deserves the consideration of this Court.

The opinion appealed from approves the inclusion in the tax base of receipts from sales unconnected with Michigan by reference to the cases sustaining state taxes on apportioned *net* income. The difference between the tax base here in question and net income is spanned by the statement that net income is a matter of definition, citing a footnote in *Atlantic Coast Line Ry. v. Daughton*, 262 U. S. 413, 67 L. ed. 1052 (1923).

But if the reasoning of this Court that sustained the net income tax cases is to have any meaning apart from the specific facts of those cases, the questions here presented do not turn on varying state definitions of net income. Rather, the question is what is the result, viewed in light of the commerce and due process clauses, of a tax on receipts where deduction for payroll and depreciation *taking place outside the taxing state* is not permitted. Can a state define income for purposes of the commerce and due process clauses to be gross receipts less ordinarily deductible expense other than payroll and depreciation? Can a state bring its tax within the permissible tax area of the *net* income taxes just by calling its tax a tax on *income?* If, as in this case, allowing a deduction of 50% from gross receipts will satisfy the rationale of the net income tax case, why will not an allowance of 10% or only 1% also suffice?

The rationale of the cases that have sustained or rejected state taxes on net income has relied for its vitality on the fact that the tax was on net income, property of the taxpayer after commerce had ceased, and was not on something more than net income as in this case. When the tax is applied to something more than net income it has been considered a forbidden direct tax. *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445 (1920); *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. ed. 1135 (1918). It is re-

spectfully submitted that the reasoning of the recent case of *Northwestern States Portland Cement Co.* is dependent upon the element of net income as that term is commonly understood, i. e., net receipts "after all expenses are paid".[3]

This Court's careful and repeated references to "net income" in the net income tax cases cannot be regarded as unnecessary to the decisions involved in those cases. The Michigan Court's disregard of these references deserves the consideration of this Court.

Even assuming, *arguendo*, that the tax in question is the equivalent of a net income tax for purposes of commerce clause questions it is respectfully submitted that such equation does not avoid due process objections.

Only a cursory examination of the deductions permitted from gross receipts by the tax act in question will show that for practical purposes the tax is on net income, plus payroll and depreciation of personal property not to exceed 50% of gross receipts. In respect to this appellant, and others who engage in no manufacturing, warehousing or commercial activity in Michigan (except solicitation of orders) Michigan payroll and depreciation is infinitesimal; in appellant's case less than 1/10 of one percent of its payroll costs are incurred in Michigan and less than 1/40,000 of its total property is located in Michigan. Appellant fashions its product from mine to finished goods entirely outside of Michigan, with all of the payroll and depreciation attendant upon a large vertically integrated mining-manufacturing-selling operation. Were appellant to purchase its finished product, whether inside or outside Michigan, it could deduct the cost of purchase in the computation

[3] *U. S. Glue Co. v. Oak Creek, supra.*

of taxable receipts. And yet, since the deductions for payroll and depreciation on personal property are not permitted, the effect of the Michigan Court's decision is to permit Michigan to tax a part of that payroll and depreciation incurred outside of Michigan. To say, as does the Michigan Court, that this does not attempt to reach outside the taxing state is to ignore reality.

The error in the Michigan Court's reasoning is summed up in the statement (p. 32a): "Plaintiff's receipts from business in this State for the period in question amounted to $91,000,000." The actual fact is that the $91,000,000 of receipts for goods shipped f.o.b. into Michigan for that period were from business that was 99.1% wholly outside Michigan, namely, mining, manufacturing, storing, administration, selling, and all other functions except solicitation of the Michigan orders.

The starting point for the computation of the base of the tax in question is gross receipts from sales everywhere and this includes gross receipts from sale of products not manufactured, stored, sold or in any other manner connected with the State of Michigan. Clearly, to include these receipts is to "reach profits attributable only to transactions beyond the State's borders". This over-extension of the State's taxing power is indistinguishable from that forbidden by cases such as *Compania General de Tobacos de Filipinas v. Collector of Internal Revenue*, 275 U. S. 87, 72 L. ed. 177 (1927); *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 82 L. ed. 673; (1937) *Hans Rees' Sons, Inc. v. North Carolina ex rel.*, 283 U. S. 123, 75 L. ed. 879; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445 (1920). Michigan sales activities provide no nexus for a Michigan tax on any part of the receipts from sales having no Michigan aspects.

Because the decision appealed from holds that the term gross receipts means receipts from *all* sales everywhere and the apportionment formula is applied to 50% of all receipts from everywhere, that decision is a clear holding that the State of Michigan has the power, the due process clause notwithstanding, to subject to an apportionment formula 50% of the receipts from a sale between Ohio and New York or Maryland and Pennsylvania, no part of such sale having any connection with Michigan. Can an apportionment formula legitimize what is otherwise so unconstitutional a tax?

Even though a three-factor payroll-property-sales formula in a given case might make for a fair apportionment within the requirements of due process (which question was not passed upon in the *Northwestern States Portland Cement Company Case*, as assumed by the Michigan Court in its decision (p. 33a)), the question still remains as to whether such apportionment formula applied to net income *plus*, as in the instant case, satisfies due process requirements. Here appellant contends that in respect to it the formula is patently unfair and violates due process guarantees in ascribing to Michigan, through the device of apportioning non-Michigan receipts, activities and parts of transactions having no connection with Michigan.

This Court has heretofore approved allocation formulas, whether for commerce clause or due process clause purposes, when applied to allocate property concepts, such as net income, *Northwestern States Portland Cement Co., supra;* capital for franchise tax purposes, *International Harvester Co. v. Evatt*, 329 U. S. 416, 91 L. ed. 390 (1946); or tangible property in cases involving transportation communication under the "unit rule", *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 93 L. ed. 585 (1949). There are sound arguments that neither gross receipts nor 50%

of gross receipts are property for purposes of allocation. When as in the instant case gross receipts from sales represent the only substantial figure on either side of the apportionment formula, it is clear that the payroll and property factors, which are the true measures of activity within the taxing state, through the process of "averaging", are given distorted value. Absent activity in the state, a tax could not be levied on the gross receipts of that sale just because of interstate shipments into that state. Should such shipments be permitted to multiply to the point of exaggeration appellant's otherwise infinitesimal factors of payroll and property? Appellant respectfully suggests that this Court's view on the question of whether such a formula results in a tax on extraterritorial values is desirable.

Appellant believes the decision under consideration has neglected to define clearly this tax as either a tax on receipts or a tax on activities; it sustains the tax by unlimited extensions of the reasoning applied to franchise or privilege taxes on local activities, "in lieu" of property taxes and taxes on net income; it completely repudiates the principles established by the so-called gross receipts tax cases; it ignores appellant's attempted showing of taxation of out-of-state payroll and property and establishes an "apportionment" concept not previously sanctioned by this Court.

2. The effect of the decision in this case is not limited to the parties.

This Court can take judicial notice of the fact that Michigan is one of the leading industrial states, both a consumer and producer, with many taxpayers both in and out of the state engaged in interstate commerce. Statistics in the Michigan Department of Revenue Annual Report for the fiscal year 1955-1956 (pages 58 and 88) show that somewhere between 2,458 and 2,723 out-of-state taxpayers were subjected to the tax in question during that fiscal year. The Detroit News (April 12, 1960) in reporting the decision here appealed from states that the impact of the case will be felt by hundreds of other companies and nullify dozens of other protests then pending.

The importance of the questions here presented to persons other than the parties is attested to by the current interest in the subject of taxation of interstate commerce. Plenary consideration of the questions presented by this appeal will serve the public interest. Title II of P. L. 86-272, 73 Stat. 555 (15 USCA 381 note), effective September 14, 1959, directs congressional committees therein designated to make studies of all matters pertaining to the taxation by the states of *income* derived within the states from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce and to report the result of such studies on or before July 1, 1962 to Congress. Appellant believes that the opinion of the Michigan Court if not reviewed will cause confusion in respect to the extent and applicability of previous decisions of this Court; and particularly those decisions thought to rest on the concept of *net income* for their validity. Clarification of this point will contribute to the objective sought by this statute.

More important, it is vital to the maintenance of an unhampered flow of commerce that any and all extensions of state power to tax interstate commerce and particularly novel taxes such as the one under consideration be fully reviewed by this Court, particularly in light of the constancy and resourcefulness of the states in devising new methods of taxation.

As this Court said in *Galveston, H & SAR. Co. v. Texas*, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, quoted with approval as recently as *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, 363, 98 L. ed. 757, 762 (1954):

> "• • • neither the state courts nor the legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect."

CONCLUSION

The jurisdiction of the Supreme Court to review this case is unquestioned. For the reasons stated it is respectfully submitted that the questions raised are sufficiently substantial to warrant plenary consideration, with briefs on the merits and oral argument for their resolutions.

Respectfully submitted,

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APPENDIX A

OPINION OF WAYNE COUNTY CIRCUIT COURT ON MOTION FOR SUMMARY JUDGMENT

(Filed February 16, 1959)

In its amended declaration plaintiff corporation sues in assumpsit for taxes paid to defendant State of Michigan arising from the enactment and administration of the so-called Business Activities Tax (Act. 150 of the Public Acts of 1953, as amended, found at MSA 7.557). Plaintiff sets forth its averments in four counts, Count I, involving the period of January 1, 1954 to March 12, 1954, wherein plaintiff claims judgment against defendants in the amount of $7,921.46; Count II, involving payments during the period March 12, 1954 to December 31, 1954, wherein plaintiff prays judgment for $60,883.94; Count III, involving the calendar year 1955, wherein judgment is prayed for $27,146.31; and Count IV, involving the period March 12, 1954 to December 31, 1955, wherein plaintiff prays judgment in the amount of $78,726.02. Interest at the rate of five per cent plus costs and attorney fees is claimed under each count.

Defendants have filed a motion for summary judgment; argument was had thereon, and exhaustive briefs filed by both parties.

Plaintiff opposes the motion among other reasons, on the basis that a full hearing is needed upon the merits before the nature of plaintiff's operations in the State of Michigan may be clearly known, and urges that the motion will lie only where there are no questions of facts to be determined by the court or jury, citing Honigman's Michigan Court Rules, Annotated, page 301; Michigan Court Rule 30, and cases thereunder, including *Peoples Savings Bank v. Stoddard, et al.*, 351 Mich. 342, decided by our Supreme Court in 1958.

Defendants, on the other hand, urge that the facts found in the pleadings and in the affidavits of Thomas M. Splan and Robert Van Haaren, Examiners for the Department of Revenue, are ample and sufficient for a determination of the motion, pointing out that those facts, not controverted by counter-affidavits, may be considered as established for the purposes of the motion.

It is our holding that the nature of plaintiff's operations in the State of Michigan is made sufficiently clear, and the methods of computation as well as the amount of taxes assesed by defendant are sufficiently set forth in the pleadings so that there are no controverted facts which, at this stage of the proceedings, preclude a determination of the questions of law raised by the motion for summary judgment. The motion for summary judgment, therefore, will lie.

NATURE OF PLAINTIFF'S OPERATION IN THE STATE OF MICHIGAN

It is conceded that plaintiff is not qualified to do business in the State of Michigan. It maintains a sales office in Detroit, and, about July 1, 1955, a branch of the Detroit office was opened in Grand Rapids. The premises occupied by plaintiff in Michigan are rented and plaintiff does own office furniture and equipment which are used to furnish its Detroit and Grand Rapids offices and maintains a bank account with which to pay the incidental expenses of operating the offices; it has teletype facilities in both Detroit and Grand Rapids.

Plaintiff employs five salesmen and eight clerks in Michigan who solicit orders for plaintiff's products and these orders are submitted in turn to the principal office in Middletown, Ohio for acceptance or rejection. The clerks in the offices facilitate the work of the salesmen and process orders. The salesmen include a manager of the Detroit district and a manager of the Detroit district office. The clerks include a record clerk, clerk-stenographers, a telephone operator and a receptionist. The salesmen communicate with customers and prospective customers in order to secure continuing orders for plaintiff's prod-

uets through personal calls or other forms of communication. The salesmen do advise plaintiff's officers and employees at Middletown, Ohio, concerning details of customers' complaints relative to defects in plaintiff's products sold to its customers in the state and its offers as to disposition.

The Detroit district manager's efforts are directed entirely to the procurement of orders for the sale of plaintiff's products and the Detroit office manager's efforts are directed to the processing of orders. The Detroit district manager is responsible to an area sales manager of the plaintiff or the manager of the plaintiff's sales division and, either by direction or request of others in the company's administrative management, he is delegated with authority to carry out his duties and responsibilities for the plaintiff.

The office manager is responsible for the internal and physical operations of the district and branch offices which handle inquiries, enter and service orders and perform general service to customers and district office personnel, and do record keeping.

It is conceded that plaintiff has never engaged in Michigan in mining, manufacturing, processing or any other activity except those enumerated above in connection with the sales of its products in Michigan. It does not maintain a Michigan inventory and all of its sales to Michigan customers are shipped FOB points outside of the state and payments by Michigan customers are made directly to plaintiff's principal offices in Middletown, Ohio. The principal offices and largest concentration of operating plants and facilities of the plaintiff are in Middletown, Ohio where it has 76 coke ovens, 11 open hearth furnaces, 2 electric furnaces, a blast furnace, a rolling mill and 2 fabricating plants. It owns and operates large installations in Ashland, Kentucky, Butler, Pennsylvania, and Hamilton and Zanesville, Ohio, with installations in Houston, Texas, Kansas City, Missouri and Sand Springs, Oklahoma. It owns ore resources in Labrador, Canada and in the Mesabi Range in Minnesota, and in Texas, as well as coal re-

sources in West Virginia and Oklahoma, producing a wide variety of steel and steel products the plaintiff sells throughout the United States through its sales office in 26 cities.

Its entire production, manufacturing and administrative operations, except as hereinbefore outlined, take place outside the State of Michigan and all its products are sold FOB the plants where they are produced. The corporation has approximately 31,000 employees, 13 of which are in Michigan on a continuous basis and their compensation is approximately one-tenth of one per cent of the corporate payroll and the value of its property in Michigan is 1/40,000 of its total property.

While conceding that salesmen in Michigan, as an incident to the processing of orders, discuss adjustments which may arise as to the performance of the steel purchased from Armco by Michigan customers, plaintiff avers that less than one per cent of the steel purchased from Armco by Michigan customers are concerned in such adjustments. Similarly, plaintiff concedes that technically trained personnel known as mill representatives are frequently in Michigan as an adjunct to the sales force handling complaints with respect to malfunction of steel by a customer; the mill representative, in the company of a salesman, decides whether the complaint is justified, these adjustments involving approximately one-half of one per cent of plaintiff's products shipped into Michigan.

Plaintiff urges that its activities in Michigan are integral and inseparable parts of interestate commerce, citing, among others, *Robbins v. Shelby County Tax District*, 120 U. S. 489, 30 Law Ed. 694, in which the United States Supreme Court in 1887 held that a privilege tax could not be imposed upon salesmen soliciting orders for an out-of-state manufacturer, saying:

> "The negotiations of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."

It is urged that although the plaintiff's method of soliciting business is somewhat more elaborate than a door-to-door drummer's solicitation, the principle of law of the drummer cases is none the less applicable. See *Coit v. Sutton*, 102 Mich. 324; *Nippert v. City of Richmond*, 327 U.S. 416, 90 Law Ed. 760; *General Trading Corp. v. The State Tax Commission of Iowa*, 322 U.S. 335, 88 Law Ed. 1309.

Plaintiff argues that it is futile for a state taxing authority to characterize an incident of interstate commerce as a local and taxable activity as here attempted. As to the maintenance of a local office and the employment of local personnel to facilitate the solicitation of orders, it is said that *Cheney Bros. v. Massachusetts*, 246 U.S. 147, 62 Law Ed. 632, represents a holding that such is not a local taxable activity but rather is an incident of interstate commerce as a means by which the business is carried on. Cited to, is a holding of the Michigan Supreme Court in *Herschel Radio v. Penn. R.R.*, 334 Mich. 148, that the maintenance of an office for the purpose of soliciting interstate business, together with all of the details incident to the maintenance of such an office, cannot be separated from interstate business activities in such a manner as to render them local or intrastate in nature, nor is the occasional resale of rejected material other than a mere incident of interstate commerce itself, it is said. *Rath Packing Co. v. General Cold Storage Co.*, 322 Mich. 315.

IS PLAINTIFF ENGAGED IN LOCAL ACTIVITY IN MICHIGAN

Defendants, on the other hand, urge that during the calendar year 1954, the plaintiff delivered to this state and sold to customers located in the state, $37,429,247.45 of its products and in the year 1955, $29,416,162. It is contended that plaintiff's activities in the state are substantial, varied, continous, regular and systematic, centered in its Detroit offices, except for a few counties in the southwestern part of the state assigned to the Chicago district office.

It is claimed that plaintiff does engage in substantial activities in this state for gain, profit or advantage and

that the opportunities and privileges granted the plaintiff are real, significant and substantial, and that the opportunities afforded plaintiff in the state enable it to maintain a market here for a substantial part of its total products as well as a source of information and intelligence for its operations everywhere. Reliance is made upon *Cleveland Cliffs Iron Co. v. Corporation and Securities Comm.*, 351 Mich. 652, at page 686:

> "Here it (plaintiff) shares with our natural citizens the solicitude of ours courts, (in fact, plaintiff is exercising that right in bringing this action) and it enjoys, in common with all, those networks of transportation and communication without which the complex (plaintiff's business structure) could not, on its present scale, exist. Is the Michigan journey to be a free ride?"

The interstate commerce clause is calculated to protect, from either discriminatory or multiple burdens, commerce between the states and to prohibit state action that impedes free commercial intercourse. But the interstate commerce clause does not forbid state taxation of what are deemed to be local activities and incidents unless there is a threat of subjecting interstate commerce to that which is held to be burdensome or discriminatory. It is clear on the pleadings thus far, albeit the admissions of plaintiff, that it carries on continuously a systematic and regular activity, utilizing the State of Michigan as one of the markets for its products. Some of the activity here in Michigan takes place before the interstate movement of plaintiff's products, and some afterwards, and the decisive question is whether under the particular facts the regular and continuous activities in the sales offices, and the incidental services performed here are in contemplation of law, a local activity.

In *Ratterman v. Western Union Telegraph Co.*, 127 U.S. 411, the U. S. Supreme Court held valid a gross receipts tax to the extent it was imposed on gross receipts

derived from intrastate communication services, reasoning that:

> "• • • where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory."

In *Pacific Telephone Co. v. Tax Commission*, 297 U.S. 403, the court recognized that an occupation tax upon local business was valid even though the local and interstate branches were inseparable. The principle has been applied, too, where local privilege taxes are placed upon merchandise in storage while in transit. See *Coverdale v. Pipeline Co.*, 303 U.S. 604.

The Minnesota Supreme Court in *Minnesota v. Northwestern Portland Cement Co.*, 84 NW 2d 373, held that the regular and systematic solicitation of business within the state which results in a continuous flow of the foreign corporation's products into the state through the channels of interstate commerce establishes jurisdictional presence in the state and that a non-discriminatory state tax upon the net income of a foreign corporation which is engaged solely in interstate commerce, which is fairly apportioned to, and measured by, that part of the net income which is derived from business done within the state is valid where the subject of the tax is not the privilege of either engaging in, or in continuing to engage in, interstate commerce; but instead the income-producing activities and transactions which, though indirectly related to interstate commerce, have become separated from the flow of that commerce and have become so localized within the state as to compete with, and enjoy, the benefits of the local business.

The Minnesota court relied upon *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147; *West Publishing Co. v. McColgan*, 328 U.S. 823, and distinguished *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, and *Spector Motor Service v. O'Connor*, 340 U.S. 602. The *Cheney* case involved a Minnesota corporation operating flour mills in Minnesota and selling the flour to wholesale dealers throughout the country with an office in Massachusetts where it employed several salesmen for the purpose of inducing local tradesmen to carry and deal in flour. The salesmen solicited and took orders from retail dealers and turned them over to the nearest wholesale dealers who filled the order and were paid by the retailer. The court held that this was a domestic business, inducing one local merchant to buy a particular class of goods from another.

RULING OF COURT

The activity of plaintiff in the State of Michigan is an extensive one as indicated by sales; it is utilizing the State of Michigan for a continuing market for its steel products and this activity requires a continued and routine presence of varied personnel within the State of Michigan. Apart from the other difficult constitutional questions raised in the proceeding, it is my holding that the several activities of plaintiff within the State of Michigan do constitute, in a tax sense, jurisdictional presence and that the transactions conducted in the State of Michigan are taxable if the formula or formulae used are not themselves constitutionally offensive.

HISTORY OF THE STATUTE

Plaintiff in its several counts distinguishes between the periods January 1, 1954 to March 12, 1954, and March 12, 1954 to July 1, 1955, and July 1, 1955 to December 31, 1955. The original act (being Act No. 150 of the Public Acts of 1952) declared in Section 2(a):

> "There is hereby levied and imposed upon persons engaged in any activity for gain, benefit or advantage in Michigan a specific tax on income at the rate specified in subdivision 'B' hereof."

In 1 (f) activity or activities were defined as:

> "Sales of property, real, personal or mixed, or the performance of services or any combination of sales of property and performances of services."

In Sec. 1 (l) income or adjusted receipts was defined as:

> "Gross receipts of any activity for gain, profit or advantage, less various deductions, or in the alternative a flat 50 per cent deduction."

Gross receipts was defined in Section 1 (j) to include:

> "Receipts from any activity carried on for gain, benefit or advantage not specifically exempt hereunder."

The tax was to be computed by application of a rate of four mills on the adjusted receipts of a business except that where a business was conducted in more than one state the tax was to be determined by taking that portion of "adjusted receipts" or "income" from a taxpayer's Michigan business as related to the total receipts of such taxpayer, an apportionment formula with a receipts factor being used. This receipts factor defined Michigan receipts to include 100 per cent of receipts derived from sales of tangible personal property from Michigan inventories to Michigan destinations and 50 per cent of the receipts derived from Michigan inventory sales to outstate destinations, and vice versa.

By Act No. 17 of the Public Acts of 1954, effective March 12, 1954, Section 2 was changed to read:

> "There is hereby levied and imposed upon persons engaging in business in Michigan a specific tax on income at the following rates: * * *"

The word "business" was substituted for the phrase "any activity for gain, benefit or advantage." The phrase

"whether intrastate, interstate or in foreign commerce" was added to the definition of "business" found in Section 1 (e).

In Section 1 (j) the phrase "from business" was substituted for the phrase "from any activity carried on for gain, benefit or advantage." Section 1 (j) was also amended and defined "gross receipts" to mean "the entire receipts of the taxpayer derived from business as herein defined, except * * *."

The definition of "adjusted receipts" or "income" in Section 1(l) was changed in the same manner as the definition of "gross receipts" that is, the phrase "gross receipts of any activity for gain, profit or advantge" was replaced by the phrase "gross receipts from business."

Section 17 of the statute was amended to read: "The specific tax imposed by the Act shall be in addition to all other taxes for which the taxpayer may be liable."

Again the statute was amended by Act 282 of the Public Acts of 1955 effective July 1, 1955, the most significant change being the substitution of the three-factor Massachusetts formula for the one-factor receipts formula. Reference had been made in the original Act and in the succeeding amendments to an apportionment formula to determine "the adjusted receipts of a taxpayer derived from, or attributable to, Michigan sources." The original Act in Section 3 in the case of a multistate business provided that the taxable "adjusted receipts" included:

> "* * * that portion of its entire adjusted receipts that receipts from its Michigan business bear to the total receipts of such taxpayer."

In the last amendment effective July 1, 1955, "adjusted receipts of a taxpayer derived from or attributable to Michigan sources," it was provided, "shall be deemed to be that portion of the adjusted receipts of the taxpayer obtained by applying the average of the following three percentages, separately computed" and the apportionment formula thereafter followed. The formula is a Massa-

chusetts formula attributing to Michigan that portion of a taxpayer's "adjusted receipts" determined by the average of that portion of its total payroll, property and receipts attributable to Michigan.

PLAINTIFF'S CONTENTIONS

Plaintiff argues that the language of the Act and its history proved the tax to be on gross receipts and not on the privilege of engaging in local activities; that Act 150 of the Public Acts of 1953, as applied to plaintiff, taxes plaintiff's activites and transactions or events outside of Michigan contrary to due process; that the Act contravenes Art. X, Sec. 6, of the Michigan Constitution by failing to distinctly state the tax and by referring to another law to fix the tax; and that the defendants have incorrectly construed the phrase "gross receipts" as used in Act 150 of the Public Acts of 1953.

On the latter point it is urged that logical construction would limit the term "gross receipts" to receipts derived from Michigan activities, and that the plain language of the statute is reasonable, that is, that gross receipts relate to receipts derived from Michigan activities and this construction, it is claimed, does not produce additional constitutional problems.

Plaintiff argues that although the subject tax is not a sales tax nor a license or franchise tax, the authorities found where states have attempted to apply such types of taxes measured by receipts from sales in interestate commerce, are in point, citing *McLeod v. Dilworth Co.*, 322 U.S. 327; *J. B. Simpson, Inc. v. O'Hara*, 277 Mich. 55; *Montgomery Ward & Co. v Fry*, 277 Mich. 260, and *Alpha Portland Cement v. Masachusetts*, 268 U.S. 203.

It is urged that before a gross receipts tax can be levied by a state there must be a local activity separable from interstate commerce, and even then, such a tax can not be imposed upon the receipts from interstate commerce; and that the interstate and intrastate receipts must be segregated. Plaintiff distinguishes cases cited by defendant.

As indicated, supra, page 8, plaintiff claims that the subject tax is constitutionally offensive under the commerce clause of the United States Constitution and relies also upon a due process argument. It is well to differentiate between these two propositions. The due process question involves an analysis as to whether the State of Michigan has reached out beyond its territorial limits with respect either to property or activities in the exercise of its taxing power, that is, whether the state has a sufficiently substantial and close connection with the transaction, whether by virtue of tax benefits conferred in general police protection and otherwise, or on account of ideas of territorial sovereignty concerning occurrence of taxable incidents within its borders, to furnish the due process foundation necessary to sustain the exercise of its taxing power." *Cleveland Cliffs Iron Co., v. Corporation and Securities Commission*, 351 Mich. 652, p. 685.

The commerce clause, on the other hand, necessitates an inquiry into the proposition whether or not the State of Michigan in imposing this tax unduly burdens interstate commerce. Earlier the cases went off on the basis that if a tax bore directly upon interstate commerce it was forbidden; but if the impact was only remote or indirect, it was upheld. Subsequently, the multiple burdens theory emerged, and there have been refinements in later cases as noted in *Cleveland Cliffs v. Corporation and Securities Commission*, supra, p. 691.

The difficulty lies in the application of the principle, where there is an interstate organism and where it is impossible to arrive at a general statement through precise or arithmetical solution. The problem in the final analysis is one of reasonableness and whether or not under the particular facts a state is attempting to project its taxing power beyond its borders.

The State of Michigan constitutionally may impose a tax upon activities of an interstate concern occurring here in the state; otherwise, that concern would be given a considerable advantage, tax-wise, over its Michigan competitors whose operations were principally domestic to

Michigan. The result would be advantage to the interstate concern, and disadvantage to the Michigan concern. We do not believe this to be the meaning of the commerce or due process clauses of the United States Constitution and certainly not a result contemplated by our Michigan Legislature in the enactment of the subject tax.

The controlling question, then, is whether the particular tax here, and the formula or formulae used in its computation, impose an unreasonable burden on interstate commerce or attempt to project the taxing power of the state beyond permissible limits.

GROSS RECEIPTS

Plaintiff urges most strongly that this is a gross receipts tax and having reached that conclusion cites those cases that would render the tax constitutionally offensive. We should not deal in semantics. We should not conclude that this is a gross receipts tax because that nomenclature is somewhere used, unless the tax is, in fact, one on gross receipts.

The language of the legislature is controlling. As indicated, supra, the original act in Section 2(a) spoke of "any activity for gain, benefit or advantage in Michigan" and "a specific tax on income," thereafter defining "activity" or "activities" as well as "adjusted receipts" as well as "gross receipts."

The 1954 amendment, effective March 12, 1954, referred again to "a specific tax on income" with the word "business" being substituted for "any activity for gain, benefit or advantage." The phrase "from business" was substituted for "from any activity carried on for gain, benefit or advantage" and in Section 1(j) as amended, "gross receipts" were defined to mean "the entire receipts of the taxpayer derived from business" and "adjusted receipts" or "income" was similarly changed.

The statute as originally enacted, and through 1955, referred to an apportionment formula to determine "the adjusted receipts of a taxpayer derived from or attributable to Michigan sources;" and as to a multistate

business it was specified that "adjusted receipts" include "that portion of its entire adjusted receipts that receipts from its Michigan business bear to the total receipts to such taxpayer." Finally, effective July 1, 1955, "adjusted receipts" were said to be that "portion of the adjusted receipts of the taxpayer obtained by applying the average of the following three percentages separately computed" using the Massachusetts formula attributing to Michigan that portion of a taxpayer's adjusted receipts determined by the average of that portion of its total payroll, property and receipts attributable to Michigan.

We have repeated this legislative history to show that by its own terms it is not a gross receipts tax, and the formula used makes it clear beyond any peradventure that it is not a gross receipts tax, but rather a tax on business activities in the State of Michigan, with the liability being finally determined through a formula that includes the factors of total payroll, property and receipts attributable to Michigan. "Receipts" are used in the formula, but the use of receipts, as a part of the formula, in our judgment does not constitute the tax a gross receipts tax.

We find persuasive, not only the reasoning of our own Michigan Supreme Court in the Cleveland Cliffs case, supra, but also the reasoning of the Minnesota Supreme Court in *Minnesota v. Northwestern States Portland Cement Co.*, 84 NW 2d, 373. It is our view that in necessary result the business activities tax here reaches income-producing transactions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used since it attempts to reach only that portion which is attributable to Michigan activity, contravenes neither the due process nor commerce clauses of the Federal Constitution.

As to the argument that the tax contravenes Act X, Sec. 6, of the Michigan Constitution through the language of Sec. 4(b) exempting from the tax, adjusted receipts which Michigan is prohibited from taxing because of

the United States Constitution or Section 19, giving the Department of Revenue power to promulgate rules and regulations consistent with the rulings of the Federal Internal Revenue Bureau with respect to the Federal income tax, it is our view that this does not constitute a reference to any other law to "impose, continue or revise the tax" and that Section 19 merely permits the Department of Revenue to prescribe rules and regulations, not an unconstitutional delegation of power.

Finally, we must reject the argument that the definition of "gross receipts" from the period March 12, 1954 through December 31, 1955, includes only the receipts derived from activities in the state. Plaintiff includes in "gross receipts," prior to apportionment, the receipts from Michigan sources, and by application of the apportionment formulae and the three-factor Massachusetts formulae to Michigan receipts attributes only a small portion to Michigan. The rationale is that the word "business," after the March 12, 1954 amendment is defined to include only activities within the state for "gain, benefit or advantage," and "gross receipts" is defined as "the entire receipts of the taxpayer derived from business as hereinafter defined."

I do not believe that the legislature intended to change substantially, the tax base as applied to multistate businesses. We prefer to adopt that construction that will best effectuate the intention of the legislature. We believe the construction urged by plaintiff would defeat the legislative intention as had been reasonably contemplated in the use of the particular language. A contrary result, we believe, would defeat the purpose of the statute and the evident intention to reach business activities carried on in the State of Michigan by an interstate concern.

For the foregoing reasons we will grant defendant's motion for summary judgment.

/s/ George E. Bowles,

Circuit Judge.

Dated: February 10, 1959.

APPENDIX B

OPINION OF MICHIGAN SUPREME COURT

DETHMERS, C. J. Plaintiff sued to recover business activities taxes paid under protest. This is its appeal from summary judgment of no cause for action.

It is plaintiff's position that the trial court erred in entering judgment for defendants because:

"1. The only activities of plaintiff in Michigan are integral and inseparable incidents of interstate commerce and consequently plaintiff's receipts are solely derived from or attributable to either intrastate activities wholly without Michigan or to interstate commerce.

"2. The tax under consideration is in operation and effect the equivalent of a tax on gross receipts and is therefore a direct tax on interstate commerce. Furthermore the tax exposes plaintiff's receipts from interstate commerce to a multiple burden. Such a direct and mulitple burden is forbidden by the commerce clause of the Federal Constitution.

"3. Even assuming that the tax in question is a tax on local activity, and further assuming that plaintiff's activity in Michigan is 'local' in nature, the manner in which the tax is applied to the plaintiff does not limit the tax to Michigan activity but results in a substantial tax on activities taking place outside of the State of Michigan contrary to guarantees of due process.

"4. The tax violates the Michigan Constitution by failing to distinctly state the tax and by requiring reference to other law.

"5. Finally, without regard to the foregoing constitutional objections, the department of revenue has incorrectly construed and applied the phrase 'gross receipts' to mean the entire receipts of plaintiff *everywhere*, instead of its entire receipts *derived from its activities in Michigan*."

Plaintiff's declaration with attached exhibits, defendants' answer, plaintiff's reply, affidavits in support of defendants' motion for summary judgment with attached exhibits, and plaintiff's affidavit of merits filed in opposition thereto, are the sources from which the facts are to be gleaned. As set forth in those sources, the undisputed, pertinent facts, and the allegations of material facts, necessary to decision herein, which, though disputed by defendants, favor plaintiff, are as follows:

Plaintiff is an Ohio corporation with its principal place of business there. It is engaged in the production, manufacture, and sales of various types of steel and steel products. All of its production and manufacture, from the smelting of ore through fabrication of steel and steel products and storing of same, occur outside of Michigan. Plaintiff has not been qualified to do business in Michigan, although defendants claim that it should have been. It has a sales office in Detroit and a branch office in Grand Rapids, which plaintiff alleges are maintained solely for convenience in the solicitation of orders for its products. It maintains a bank account in Michigan for the convenience of the operations of the 2 offices. It employs in Michigan 5 salesmen, who solicit orders for its products in this State, and 8 clerks, in the 2 offices, who facilitate the work of the salesmen and process the orders obtained by them. It has more than 31,000 employees. Its Michigan payroll is less than 1/10 of 1% of its total payroll. The total value of its property in Michigan is less than 1/40,000 of its total property. Orders from Michigan are accepted or rejected at the home office in Ohio. Its sales to Michigan customers are shipped f.o.b. points outside this State, and payments by them are made to plaintiff at its Ohio offices.

During 1954 and 1955, the period here involved, plaintiff's receipts from all sources were $1,636,764,419.13 and those from sales in Michigan $91,038,459.21.

Plaintiff's 5 Michigan salesmen not only solicit orders for its products, but they also discuss adjustments with customers for malfunctioning of its steel deliveries, involving less than 1% of its sales here. They are in charge of and responsible to plaintiff's district sales manager in this State, who reports to an area manager in Ohio. Under the district sales manager there is an office manager in Detroit, who is in charge of the general work in the 2 offices and of the clerical aspects of processing Michigan orders and handling related correspondence.

Included in the duties and responsibilities of plaintiff's district sales manager in Michigan are the following: To serve the customer's interests, to direct plaintiff's activities in the Detroit area, to act in a consulting capacity, to assume managerial responsibilities, to direct and coordinate activities of sales personnel in an effort to carry out effectively and efficiently management requests pertaining to the securing of profitable business in Michigan, to promote and protect the best interests of plaintiff, to provide proper and adequate leadership, to keep his immediate superior informed of any unusual changes made by customers and competition which may affect plaintiff's overall position in the industry, including prices, expansion, strikes, changes in personnel, new products and grades, et cetera, to develop and maintain a harmonious working staff to work with customers and the home office, to build up customer relationships, to endeavor to operate within the budget, with especial emphasis on controllable items, to direct performance of assignments and responsibilities delegated by management, to resolve claims and complaints, to help plan sales programs, to analyze customers' needs in relation to patterns and determine the distribution of allotted tonnages, to report and resolve matters of price, quality, practices and methods not considered ordinary or competitive, to observe and report trends of commercial, industrial or economic nature as may affect or influ-

ence future business levels and plaintiff's planning, to maintain and develop contacts other than of a straight sales nature that may be of benefit to plaintiff, at times to accompany salesmen on customer calls and customers on calls to the home office, to set up budgets and disburse moneys for traveling expenses of salesmen, et cetera. He is not required to be a salesman or to solicit orders.

The Detroit office manager is under the sales manager. He is responsible for the prompt and accurate execution of all work involved in handling inquiries, quotations, entry, and service of orders, and general service to customers and district office personnel. This includes direct supervision of some 7 or 8 persons who are under the indirect supervision of the district sales manager. It also entails the responsibility for the accuracy of records in the office on quotas, status of orders, et cetera, and of files, such as pending claims, correspondence and the like, visualizer, order books, tonnage, and various other records, including salesmen's call reports and general information in regard to customer packaging and traffic problems.

The role of plaintiff's Michigan salesmen is extensive. Existing customers of plaintiff in Michigan are assigned to individual salesmen. Each salesmen is generally given a specific territory in which existing customers are located, to the end that all the area of the State of Michigan and all existing customers are assigned and served by sales personnel of plaintiff. Approximately 40% of the time of the salesmen is spent in the district office, answering inquiries of the customers assigned to them and adjusting, processing, correcting, and screening customers' orders. The remaining time of the salesmen is spent in making calls on customers assigned to them at the customers' places of business. The salesmen's service activities include processing order changes; handling quality problems; investigating into customers' claims and complaints; negotiating settlement of such claims and complaints; assisting the customer and other personnel of plaintiff by arranging for mill representatives, sales engineers, metallurgists, research personnel, market development person-

nel, and credit representatives to visit the customer and give specialized help; and providing technical information to customers' research or metallurgical personnel, which the salesmen secure from plaintiff's technical personnel at plaintiff's mill locations or its home office in Middletown, Ohio. The activity of plaintiff's salesmen in providing these services to customers assigned to them is discharged primarily by regular, routine, and systematic calls on the customers at the locations where the customers are using the plaintiff's products. Plaintiff's salesmen make general, routine contacts with the customers to handle specific problems or complaints and to get commitments for orders on a continuing basis and in handling complaints and problems in connection with processing orders in their offices.

Both in connection with the ordering of steel to make new parts, and in connection with claims of Michigan customers, mill representatives are frequently in Michigan. The mill representatives have special technical knowledge of the physical characteristics and qualities of plaintiff's products and their application to particular uses. The activities of such representatives of plaintiff in Michigan are solely an aid to plaintiff's sales efforts. If there is a complaint, for instance, that a given shipment of steel did not perform as specified, the salesman would request assistance from the mill, whereupon a mill representative would accompany the salesman to the customer's plant to investigate the complaint and to determine whether it was justified. If the mill representative should conclude that the complaint was justified, so that an adjustment was indicated, the decision as to the type of adjustment to be made and the amount of the same would uniformly be made in Middletown, Ohio.

Product managers also come into Michigan. The duties and responsibilities of these personnel are primarily centered around special sales effort and technical assistance to stimulate and promote the sale of a specific product. In carrying out these responsibilities, the product managers, being more familiar with the particular problems

of a particular product, are called in on quality and application problems in an advisory capacity by salesmen at present and future customers' locations, including Michigan.

Various executive personnel, such as the vice president in charge of distribution, general manager of the sales division, and area sales managers of appellant contact Michigan customers from time to time on such situations as negotiation of allotments, potential steel requirements of customers, advance commitments of customers for use of plaintiff's products, disposition of quality problems warranting top-level consideration because of the magnitude, and for future planning and projection purposes, including determination of future sales policy, the capacity and limitation of mills, and the problem of maintaining plaintiff's position in the market or industry, both within and without the State of Michigan.

Market development division personnel come into Michigan to gather statistical and other information regarding a particular product or industry in order that plaintiff's management can key their current and potential production capacities to changing market conditions.

Research division personnel make various visitations to Michigan customers for the purpose of coordinating certain research projects with customers' needs; assisting customers in certain applications of plaintiff's products; observing and advising on trends being made on products sold by plaintiff; and giving technical assistance, when necessary, in the solution of production and quality problems, including establishing proper testing methods, of other divisions of plaintiff, including market development and sales.

Operating division personnel visit customers of plaintiff in this State on various quality problems and methods of application of plaintiff's steel products. In addition, various operating division executives, such as the vice president in charge of operations, administrative assistant to the vice president in charge of operations, and mill, or works, managers, have made visits to Michigan customers to

familiarize themselves and to assist the customers on various methods of application, on future planning and expansion of facilities, mill limitations, and various other operating policies.

Various visits have been made by the credit manager of the treasury division to customers in Michigan to review the financial condition of the customer and obtain the potentiality of customers for the purpose of credit extension.

Traffic division personnel visit Michigan from time to time to investigate and contact customers with reference to traffic and shipping problems, including questions of responsibility of damaged shipments, new methods of shipping, packaging, and handling plaintiff's steel products.

The activities of all the above referred to personnel in this State are generally at the request of and subject to the direction and control of the Detroit district office where they are coordinated and implemented by various office personnel of the plaintiff who carry on their activities in the Detroit district office.

All of the orders obtained by plaintiff from its Michigan customers involve activity of plaintiff's employees in this State. Orders are processed and screened through the Detroit district office on such items as tonnage allotments, loading and shipping data, promises of delivery dates, credit information, specifications, and other information required to properly process an order through the sales service department of the sales devision of plaintiff located in Middletown, Ohio. Routinely, orders sent in by customers do not contain many of the items of information essential to the processing of such orders through the sales service department. The information on a customer's order, together with other information necessary to complete such order, are routinely copied on a uniform yellow worksheet, which is the paper processed by plaintiff's sales service department rather than the incompleted order of the customer. The information not appearing on an order sent in by a customer, with the exception of the date of delivery promises, is contained on what is known as a

"visualizer" in the Detroit office. Each order is completed and screened in this manner through the Detroit district office prior to transmittal to the sales service department of plaintiff at Middletown, Ohio. If an order contains information not in agreement with information appearing on the "visualizer," the order is either corrected and processed or it is rejected and returned to the customer, depending on the nature or extent of the discrepancy. If, for example, a problem in regard to delivery date or specification is involved and personnel in the Detroit office believe it can be cleared with the customer, the customer will be contacted and the order will be changed accordingly and processed. If the order calls for a product that is not available because of the lack of steel or because plaintiff is not in a position to fill that order because of prior commitments or the limitations of its mills, the order is automatically rejected.

The activity of all of plaintiff's personnel in this State is directly related to plaintiff's ability to have, establish, and maintain in this State a market for its products. Much of the activity of plaintiff in this State is not directly related to the solicitation of any particular orders for any of plaintiff's products. Plaintiff's salesmen do not routinely solicit specific orders but spend their time in making general, routine contacts with the customers to handle specific problems or complaints and to get commitments for orders on a continuing basis.

The lower court concluded that plaintiff carries on continuously a systematic and regular activity, utilizing the State of Michigan as one of the markets for its products; that some of the activity here in Michigan takes place before the interstate movement of plaintiff's products, and some afterwards. The court further concluded that in necessary result the business activities tax here reaches income-producing transactions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used, since it attempts to reach only that portion which is attributable to Michigan activity, contravenes

neither the due process nor commerce clauses of the Federal Constitution.

The time here involved is 1954-1955. In effect during that period was PA 1953, No. 150, as originally enacted (Stat Ann 1953 Cum Supp §7.557[1] *et seq.*), then as amended by PA 1954, No. 17, effective March 12, 1954 (CLS 1954, §205.551 *et seq.*), and, finally, as amended by PA 1955, No. 282, effective July 1, 1955 (CLS 1956, §205.551 *et seq.* [Stat Ann 1955 Cum Supp §7.557 (1) *et seq.*]). The title announces it to be "An act to provide for the raising of additional public revenue by prescribing certain *specific taxes on income* * * *." The act provides that the terms "income" and "adjusted receipts" are used therein interchangeably and that they shall be the gross receipts from business, including sales, less specified deductions, consisting of certain costs of conducting business, or, if such deductions do not constitute at least 50% of the gross receipts, then less a 50% deduction. The definition of "gross receipts" includes the entire receipts from any sales, whether made in inter- or intrastate commerce. A number of exemptions from the tax are provided, including the first $10,000 of adjusted receipts, and anything which the State is expressly or impliedly prohibited from taxing by the Constitution of the United States.

With respect to adjusted receipts or income of the business of persons engaging in any activity in Michigan a tax of 4 mills was laid on such adjusted receipts allocated to Michigan or, under later amendment, 6½ mills on adjusted receipts derived from or attributable to Michigan sources. The act, as last amended, provides that adjusted receipts derived from or attributable to Michigan sources shall be taken to be (1) the entire adjusted receipts of a taxpayer whose business transactions take place entirely within the State, but, (2) in the case of a taxpayer whose business transactions occur partially within and partially without this State, only that portion of his adjusted receipts obtained by applying thereto the following apportionment formula, viz., the average of the following 3 percentages, separately computed: (1) ratio of taxpayer's Michigan

property to all of his property, (2) ratio of wages paid by taxpayer in Michigan to wages he paid everywhere, and (3) ratio of his gross receipts from Michigan sales to those obtained from sales everywhere. Before the 1955 amendment a different formula was applied. The amendments are not significant to the constitutional questions here involved.

This tax is part of a general scheme of State taxation of business activities in Michigan. It is a tax on Michigan activities measured, in amount, by adjusted receipts derived from or attributable to Michigan sources, which, as above noted, in the case of a taxpayer whose business transactions occur entirely within Michigan, means his entire adjusted receipts, but, if his business transactions occur partly within and partly without this State, means the sum reached by applying to his adjusted receipts the mentioned apportionment formula. It is, therefore, not a gross receipts tax. Neither is it, as hereinafter considered, a tax on the privilege of doing interstate business in Michigan.

Is the interstate commerce clause, US Const, art 1, § 8, offended by this tax as applied to plaintiff's business activities? An excellent listing and classification of the leading decisions of the United States supreme court in this general area are to be found in Mr. Justice EDWARDS' opinion in *Duluth, South Shore & Atlantic R. Co. v. Corporation & Securities Commission*, 353 Mich 636, on pages 655, 656 and 657, examination of which is invaluable to consideration of the problem before us. Pertinent from that opinion is the following:

> "On the other hand, the same court [United States supreme court] has upheld as not offending the commerce clause State taxes in at least the following classifications: * * *
>
> "(2) Taxes levied upon net income of business engaged in interstate commerce where the portion of net income taxed was reasonably apportioned as to the taxing State. *United States Glue Co. v. Town of Oak Creek*, 247 US 321 (38 S Ct 499, 62 L ed 1135,

Ann Cas. 1918E, 748); *Underwood Typewriter Co. Chamberlain*, 254 US 113 (41 S Ct 45, 65, L ed 165); *Bass, Ratcliff & Gretton, Limited, v. State Tax Commission*, 266 US 271 (45 S Ct 82, 69 L ed 282).

"(3) Taxes levied directly upon interstate commerce (or gross receipts therefrom) but held reasonably related to occasioning interstate commerce to pay its own way in the taxing State. *Postal Telegraph Cable Co. v. City of Richmond*, 249 US 252 (39 S Ct 265, 63 L ed 590); *Interstate Busses Corporation v. Blodgett*, 276 US 245 (48 S Ct 230, 72 L ed 551); *Western Live Stock v. Bureau of Revenue of New Mexico*, 303 US 250, see cases cited, p. 254 (58 S Ct 546, 82 L ed 823, 115 ALR 944)."

Plaintiff's continuous and systematic Michigan activities in developing and using this State as a market for its product and the functions of its salesmen, all as above outlined, clearly distinguish this from the long line of drummer cases invalidating imposition by States or municipalities of a license tax on drummers for the privilege of soliciting orders for interstate business, such as *Robbins v. Shelby County Taxing District*, 120 US 489 (7 S Ct 592, 30 L ed 694), *Memphis Steam Laundry v. Stone*, 342 US 389 (72 S Ct 424, 96 L ed 436), and *Nippert v. Richmond*, 327 US 416 (66 S Ct 586, 90 L ed 760, 162 ALR 844). The nature of the tax before us, as spelled out in the second preceding paragraph; is not, as those in the drummer cases were held to be, a tax on interstate commerce nor on the privilege of conducting it, held unconstitutional in such cases as *Spector Motor Service, Inc., v. O'Connor*, 340 US 602 (71 S Ct 508, 95 L ed 573). In *B. F. Goodrich Company v. State of Washington*, 38 Wash 2d 663 (231 P 2d 325) (certiorari denied, 342 US 876 [72 S Ct 167, 96 L ed 659]), where the activities of the taxpayer within the State were markedly similar to those of plaintiff in Michigan, the court said (p. 673):

"It seems clear that, under this test, the sales made by the B. F. Goodrich Company in classes A, B, and

D are constitutionally taxable. In all of these sales, business is channeled through the company's local outlets, and not only has appellant failed to demonstrate that the services rendered by these offices do not play a significant part in establishing and holding this market, it affirmatively appears that they do so. In this connection, *McLeod v. J. E. Dilworth Co.*, 322 US 327 (64 S Ct 1023, 88 L ed 1304), is of no assistance to appellant; for, there, the company which Arkansas sought to tax maintained no local office within Arkansas, but operated only through itinerant solicitors; and this fact, as the *Norton Company Case* (*Norton Co. v. Department of Revenue of Illinois*, 340 US 534 [71 S Ct 377, 95 L ed 517]) demonstrates, is sufficient to mark a controlling distinction between the *McLeod Case* and that at bar."

In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 US 33, 56, 57 (60 S Ct 388, 84 L ed 565, 128 ALR 876), the court said:

"It is enough for present purposes that the rule of *Robbins v. Shelby County Taxing District, supra,* has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

Also, in the *Nippert Case* the court said (pp 424, 425):

"Thus the essence of the distinction taken in the *Berwind-White Case* was that the taxes outlawed in the drummer cases in their practical operation worked discriminatorily against interstate commerce to impose upon it a burden, either in fact or by the very threat of its incidence, which they did not place upon competing local business."

This distinction made in *Nippert* is highly significant here inasmuch as the facts before us, drawn from the sources above mentioned, show no such discrimination or undue burden.

Plaintiff cites *Fargo v. Michigan*, 121 US 230 (7 S Ct 857, 30 L ed 888), *New Jersey Bell Telephone Co. v. Tax Board of New Jersey*, 280 US 338 (50 S Ct 111, 74 L ed 463), *Freeman v. Hewit*, 329 US 249 (67 S Ct 274, 91 L ed 265), and other cases for the proposition that direct taxes on gross receipts from interstate commerce are forbidden to the States. None involved, as here, an apportioned adjusted receipts or income tax. In *Western Live Stock v. Bureau of Revenue of New Mexico*, 303 US 250, 256, 257 (58 S Ct 546, 82 L ed 823, 115 ALR 944), the court said:

> "Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. R. Co. v. Powers*, 191 US 379 (24 S Ct 107, 48 L ed 229); *Maine v. Grand Trunk R. Co.*, 142 US 217 (12 S Ct 121, 163, 35 L ed 994); *Cudahy Packing Co. v. Minnesota*, 246 US 450 (38 S Ct 373, 62 L ed 827); *United States Express Co. v. Minnesota*, 223 US 335, (32 S Ct 211, 56 L ed 459), and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. *Fargo v. Michigan*, 121 US 230 (7 S Ct 857, 30 L ed 888); *Galveston, H. & S. A. R. Co. v. Texas*, 210 US 217 (28 S Ct 638, 52 L ed 1031); *Meyer v. Wells, Fargo & Co.*, 223 US 298 (32 S Ct 218, 56 L ed 445), with which compare *Wisconsin & M. R. Co. v. Powers, supra.* Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine v. Grand Trunk R. Co., supra; Ficklen v. Shelby County Taxing Dist.*, 145 US 1 (12 S Ct 810, 36 L ed 601); *American Manfg. Co. v. St Louis*, 250 US 459 (39 S Ct 522, 63 L ed 1084), or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co. v. Minnesota, supra; United States Express Company v. Minnesota, supra; cf. Postal Telegraph Cable Co. v. Adams*, 155 US 688 (15 S Ct 268, 360, 39 L ed 311); see *McHenry v. Alford*, 168 US 651, 670, 671 (18 S Ct 242, 42 L ed 614), it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple

taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every State where the commerce is carried on."

In *Central Greyhound Lines, Inc., v. Mealey*, 334 US 653 (68 S Ct 1260, 92 L ed 1633), the court considered a State tax on gross receipts from the transportation of passengers between 2 points within the State over a route partially in and partially out of the State, and held such tax constitutional if apportioned to include mileage within the State and to exclude the mileage outside the State. The court said (p 663) of such tax that it was lawful if "fairly apportioned" to the "business done within the State by a fair method of apportionment." We hold that, within the meaning of this *Greyhound Case*, such fair method of apportionment is provided in the Michigan statute which levies a tax not on gross receipts (in view of its deductions, exemptions, and apportionment features), but only on "adjusted receipts" derived from or attributable to Michigan sources, under an apportionment formula.

The so-called "Indiana Gross Receipts Tax" cases, referred to by plaintiff, such as *J. D. Adams Manfg. Co. v. Storen*, 304 US 307 (58 S Ct 913, 82 L ed 1365, 117 ALR 429), holding invalid such tax on gross receipts in Indiana from sales to out-of-state customers, are distinguishable in that that tax lacked an apportionment feature such as exists in the Michigan statute, and there the tax was sought to be levied by the seller's State on proceeds from sales outside the State, while involved here is a tax by the buyer's State. For cases upholding similar taxes, imposed by the buyer's State, by reason of the activities in which the seller engaged in such State, see *West Publishing Co. v. McColgan*, 27 Cal 2d 705 (166 P 2d 861), (affirmed 328 US 823 [66 S Ct 1378, 90 L ed 1603]), and *Field Enterprises, Inc., v. State of Washington*, 47 Wash 2d 852 (289 P 2d 1010) (affirmed 352 US 806 [77 S Ct 55, 1 L ed 2d 39]). These support this Michigan tax on plaintiff's business activities in this State, even if it were to be viewed as a gross receipts tax. In fact, however, it is not

such tax, but an income tax, measured by adjusted receipts and arrived at by application of an apportionment formula and the prescribed rate.

Plaintiff, in alluding to cases approving State taxes on net income derived from interstate commerce apportioned to the taxing State, such as *United States Glue Co. v. Oak Creek* (1918), 247 US 321 (38 S Ct 499, 62 L ed 1135, Ann Cas 1918E, 748); *Shaffer v. Carter* (1920), 252 US 37 (40 S Ct 221, 64 L ed 445); *Underwood Typewriter Co. v. Chamberlain* (1920), 254 US 113 (41 S Ct 45, 65 L ed 165), says they are distinguishable in that the taxes upheld were measured by net income while the one at bar is measured by gross receipts, quoting, with respect to the significance of that distinction, from the *United States Glue Co. Case*. Plaintiff terms this a gross receipts tax because, among the deductions permitted, permission is notably missing for deductions from gross receipts for payroll and depreciation. (Deduction for depreciation of real property is now permitted by the 1955 amendment.) In plaintiff's view, permission to make those deductions is prerequisite to the validity of the tax as an income tax. In this connection we quote from *Atlantic Coast Line R. Co. v. Daughton*, 262 US 413 (43 S Ct 620, 67 L ed 1051) footnote 6 on p 422, the following:

> "The term 'net income,' in law or in economics, has not a rigid meaning. Every income tax act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation. These details are largely a matter of governmental policy. As to them States differ; and there is apt to be difference of view in the same States at different times; and at the same time a different definition of taxable net income for different classes of taxpayers. Obviously such differences in detail do not render obnoxious to the commerce clause a State income tax which is otherwise unobjectionable."

Accordingly, we think the mentioned income tax cases in point here and that their holdings and reasoning, by analogy at least, support the validity of the tax at bar.

Is the tax, as applied to plaintiff here, violative of due process for extraterritoriality? Does it tax transactions, events or activities beyond Michigan's borders? (See: *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue* [1927], 275 US 87 [48 S Ct 100, 72 L ed 177]; *Equitable Life Assurance Society of the United States v. Pennsylvania* [1915], 238 US 143 [35 S Ct 829, 59 L ed 1239]; *Connecticut General Life Insurance Co. v. Johnson* [1937], 303 US 77 [58 S Ct 436, 82 L ed 673].) Does it attribute to taxable activity within Michigan's borders an unreasonable and arbitrary portion of plaintiff's activity elsewhere? (See: *Hans Rees' Sons, Inc., v. North Carolina* [1931], 283 US 123 [51 S Ct 385, 75 L ed 879].) We think not. It does not attempt to reach outside the taxing State, as in *Connecticut General Life Insurance Co. v. Johnson, supra.* It does not reach profits attributable only to transactions beyond this State's borders as in *Hans Rees' Sons, Inc., v. North Carolina, supra.* As held in that case, a reasonable apportionment formula, provided in the statute here under consideration, ends questions of due process. In keeping with the test in *James v. Dravo Contracting Co.*, 302 US 134 (58 S Ct 208, 82 L ed 155, 114 ALR 318), the tax is levied on activities carried on within this State. The statute carefully provides that it shall be levied only on "adjusted receipts," "derived from or attributable to Michigan sources." This makes for fair and reasonable apportionment of the tax to Michigan business, Michigan activities only. To requote from *Western Live Stock v. Bureau of Revenue of New Mexico*, 303 US 250, 256 (58 S Ct 546, 82 L ed 823, 115 ALR 944):

> "Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing State."

When plaintiff seeks to attack the formula of apportionment as unreasonable or unfair, the distinct burden rests upon it of "showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." *But-*

ler Brothers v. McColgan, 315 US 501, 507 (62 S Ct 701, 86 L ed 991). Such are not the facts before us, to be drawn from the sources above indicated. Plaintiff's receipts from business in this State for the period in question amounted to $91,000,000. The tax exaction involved in this case is $95,951.71, or about 1/10 of 1% of the total Michigan business figure. This is not an unreasonable tax on business activities in Michigan. The tax as apportioned bears a real and reasonable relationship to the privileges, opportunities, and protection plaintiff enjoys in conducting its interstate business in this State. This meets the requirements of *International Shoe Co. v. State of Washington*, 326 US 310 (66 S Ct 154, 90 L ed 95, 161 ALR 1057), *Wisconsin v. J. C. Penney Co.*, 311 US 435 (61 S Ct 246, 85 L ed 267, 130 ALR 1229), *Ott v. Mississippi Valley Barge Line Co.*, 336 US 169 (69 S Ct 432, 93 L ed 585), and the many other cases on this subject.

We think it may be said of the due process clause as well as of the commerce clause, as was said concerning the latter by the United States supreme court in *Western Live Stock v. Bureau of Revenue of New Mexico*, 303 US 250, 254 (58 S Ct 546, 82 L ed 823, 115 ALR 944):

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of State tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way.' *Postal Telegraph-Cable Co. v. City of Richmond*, 249 US 252, 259 (39 S Ct 265, 63 L ed 590); *Fickden v. Shelby County Taxing Dist.*, 145 US 1, 24 (12 S Ct 810, 36 L ed 601); *Postal Telegraph Cable Co. v. Adams*, 155 US 688, 696 (15 S Ct 268, 360, 39 L ed 311); *Galveston, H. & S. A. R. Co. v. Texas*, 210 US 217, 225, 227 (28 S Ct 638, 52 L ed 1031)."

As already observed, this tax on Michigan business activities is arrived at by imposing a rate and applying an apportionment formula to "adjusted receipts" or "income" derived from or attributable to Michigan sources.

We have previously considered the applicability of the income tax case decisions, on the ground that the extent, character, and details of exemptions and deductions from gross proceeds are not decisive of the question of the nature of the tax. So considered, the case of *Northwestern States Portland Cement Co. v. Minnesota*, 358 US 450 (79 S Ct 357, 3 L ed 2d 421), is definitely controlling. (See, also, its companion case, *Williams v. Stockham Valves & Fittings, Inc.*, 358 US 450, footnote [79 S Ct 357, 3 L ed 2d 421].) The *Cement Company Case* is conclusive of both the commerce clause and due process clause aspects of this case. There the court held that a State income tax imposed on a foreign corporation, computed at a nondiscriminatory rate on that portion of its net income from its interstate business which is reasonably attributable to its business activities in the taxing State, does not violate either the commerce clause or the due process clause of the Federal Constitution. The apportionment formula employed in that case is like that in the instant case. (Massachusetts formula.) The taxpayer's activities in the taxing State were no more extensive or elaborate, and, in fact, were very similar to those of plaintiff in Michigan. In every respect, it seems to us, both the holding and the reasoning of the court there are applicable to and controlling of the facts and situation at bar. In point from the opinion therein is the following (pp 458, 459, 461, 462):

> "It has long been established doctrine that the commerce clause gives exclusive power to the congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. *Gibbons v. Ogden* (1824), 9 Wheat (22 US) 1 (6 L ed 23). In keeping therewith a State 'cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose' such as itinerant drummers. *Robbins v. Shelby County Taxing District* (1887), 129 US 489, 493, 494 (7 S Ct 592, 30 L ed 694). Moreover, it is beyond dispute that

a State may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service v. O'Connor* (1951), 340 US 602 (71 S Ct 508, 95 L ed 573). Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry v. Stone* (1952), 342 US 389 (72 S Ct 424, 96 L ed 436); *Nippert v. Richmond* (1946), 327 US 416 (66 S Ct 586, 90 L ed 760, 162 ALR 844), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1954), 347 US 157 (74 S Ct 396, 98 L ed 583); *J. D. Adams Manfg. Co. v. Storen*, (1938), 304 US 307 (58 S Ct 913, 82 L ed 1365, 117 ALR 429). Such impositions have been stricken because the States, under the commerce clause, are not allowed 'one single-tax-worth of direct interference with the free flow of commerce.' *Freeman v. Hewit* (1946), 329 US 249, 256 (67 S Ct 274, 91 L ed 265).

"On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon State interference with such commerce. • • •

"We believe that the rationale of these cases, involving income levies by States, controls the issues here. The taxes are not regulations in any sense of that term. Admittedly they do not discriminate against nor subject either corporation to an undue burden. While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the State government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only through ordinary means. The tax, therefore, is 'not open to the objection that it compels

the company to pay for the privilege of engaging in interstate commerce.' *Underwood Typewriter Co. v. Chamberlain* (1920), 254 US 113, 119 (41 S Ct 45, 65 L ed 165). As was said in *Wisconsin v. Minnesota Mining & Manfg. Co.* (1940), 311 US 452, 453 (61 S Ct 253, 85 L ed 274), 'it is too late in the day to find offense to that [commerce] clause because a State tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing State.'

"While the economic wisdom of State net income taxes is one of State policy not for our decision, one of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in *Central Greyhound Lines v. Mealey* (1948), 334 US 653, 661, 670 (68 S Ct 1260, 92 L ed 1633), 'it is interstate commerce which the State is seeking to reach and • • • the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.' The apportioned tax is designed to meet this very requirement and 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce.'"

Application of the above quoted language from *Northwestern Cement Company* to the facts here, leaves the validity of the Michigan tax undoubted. For here, as in that case, (1) there is no direct restriction on interstate commerce, (2) the tax is not imposed on persons coming into the State for a temporary purpose, such as itinerant drummers, (3) the tax is not laid on the privilege or right of engaging in interstate commerce in the State, (4) the

tax does not discriminate against interstate commerce by providing a direct commercial advantage to local business, nor does it subject it to an undue burden, but, on the contrary, it is laid alike on activities in furtherance of either inter- or intrastate business, computed according to the adjusted receipts therefrom derived from or attributable to Michigan sources, (5) the tax is not a regulation of any kind, (6) the State is left to collect only through ordinary means and, hence, the tax does not compel plaintiff to pay for the privilege of engaging in interstate commerce, (7) as in *Northwestern Cement Company*, the posibility of a multiple burden from this exaction is not made to appear here, (8) this is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share and, (9) what the State is exacting is a constitutionally fair demand for that aspect of interstate commerce to which this State bears a special relation. Accordingly, the tax must be held to be constitutional and valid as applied to plaintiff and its activities here. In the language of the trial judge:

> "It is our view that in necessary result the business activities tax here reaches income-producing transactions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used since it attempts to reach only that portion which is attributable to Michigan activity, contravenes neither the due process nor commerce clauses of the Federal Constitution."

We reject plaintiff's claim that the taxing act violates Michigan Constitution (1908), art 10, §6, for failure to distinctly state the tax and because of its reference to the United States Constitution in exempting that which the State may not tax under that Constitution. This recognition in the statute of the State's limitations with respect to imposing a tax violative of the United States Constitution is not an infirmity such as is contemplated by article 10, §6. Neither is the section violated by the provision in the

statute (section 19, CLS 1956, §205.569 [Stat Ann 1959 Cum Supp §7.557(19)]) that the department of revenue, in promulgating rules governing deductions as it is therein directed to do, shall follow, where not inconsistent with the act, the rulings of the Federal internal revenue bureau with respect to income tax. It is still the rules of the State department, promulgated as provided by and consistent with the statute, which govern, within the limitations fixed by the statute, and that comports with traditional practice in this State. We find that, despite some lack of artistry in phrasing of section 2(b) of the original act and of section 3(b) of the act as amended, careful attention to their provisions, together with all of those of section 3 as amended (CLS 1956, §205.553 [Stat Ann 1959 Cum Supp §7.557 (3)]), should make the computation of the tax well within the competence of those employed in the defendant department and of taxpayers generally affected thereby.

Finally, the parties are in disagreement as to the proper construction to be given the term "gross receipts," as used in the act, as relates to a taxpayer whose business transactions occur partially within and partially without this State. Plaintiff contends that in determining the adjusted receipts of such taxpayer derived from or attributable to Michigan sources, by application of the apportionment formula to adjusted receipts, the latter are to be arrived at by subtracting the statutory deductions from gross receipts from plaintiff's Michigan sales only. This, plaintiff reasons, follows from the act's definition of gross receipts as the taxpayer's entire receipts, with certain exceptions, from business as therein defined and its definition of business as activities engaged in within this State. Defendants say such deductions are to be taken from plaintiff's gross receipts from sales both in and outside Michigan with the resulting adjusted receipts forming the basis, by formula application, for determining adjusted receipts attributable to Michigan. If plaintiff's contention were given effect, the taxpayer with a total of $1,000,000 receipts whose business transactions all occurred inside Michigan

would pay a higher tax than the taxpayer who received $1,000,000 from Michigan sales and $1,000,000 from out-of-State sales, and the latter would pay a great deal more than a third taxpayer who received $1,000,000 from Michigan sales and $10,000,000 from sales outside Michigan. There is nothing in the act to suggest such legislative intent. Clearly the legislatu intended that each should pay a comparable tax on its comparable Michigan activities producing $1,000,000 of receipts from Michigan sales. The provisions of the act providing for taxing of activities of one whose business transactions occur entirely in Michigan and those providing for taxing the activities in Michigan of a taxpayer whose business transactions occur partially within and partially without this State, complement each other, as was held in *Western Electric Co. v. Revenue Department*, 312 Mich 582, with respect to the Michigan sales tax and its use tax. Complementary taxing of local and interstate business was upheld in *Nelson v. Sears, Roebuck & Co.*, 312 US 359 (61 S Ct 586, 85 L ed 888, 132 ALR 475). While the tax may not discriminate against interstate commerce, there is no constitutional requirement that it do so against intrastate sales, and the statute evidences no legislative intent to do so. To accept plaintiff's theory poses the question why the statute requires inclusion of gross receipts from sales within and without the State as the denominator in the sales quotient part of the apportionment formula. It is unreasonable to assume that only Michigan gross receipts are to be used as the base for arriving at adjusted receipts derived from Michigan sources, when the formula to be used for that purpose includes as one of its factors a fraction whose denominator is gross receipts derived from everywhere. It is manifest that this process would utterly fail to reflect fairly the proportion of plaintiff's adjusted receipts attributable to and derived from Michigan sources. This would defeat, in part, the object of the act to tax business activities in Michigan equally by levying on all the income derived therefrom which is attributable to Michigan sources.

Affirmed, without costs, a public question being involved.

APPENDIX C

ACT No. 150, PUBLIC ACTS OF 1953 AS AMENDED

• • • • • •

Sec. 1. When used in this act:

• • • • • •

(e) The term "business" shall include all activities engaged in or caused to be engaged in within this state, whether in intrastate, interstate, or in foreign commerce, with the object of gain, benefit or advantage, whether direct or indirect, to the taxpayer or to another or others, but shall not include the services rendered by an employee to his employer or a casual or isolated transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each such activity shall be considered to be business engaged in within the meaning of this act.

(f) The term "activity" or "activities" shall mean sales of property, real, personal or mixed, or the performance of services, or any combination of sales of property and performances of services.

• • • • • •

(h) The term "sale" or "sales" shall mean and include the transfer of possession or of ownership, or both, for a consideration.

(i) The term "service" or "services" shall mean and include every type of endeavor other than sales.

(j) The term "gross receipts" shall mean the entire receipts of the taxpayer derived from business, as herein defined, except: (exceptions include proceeds from sale of capital assets, repayment of debts and other similar receipts not material to the issues in this case).

• • • • • •

(l) The term "income" and the term "adjusted receipts", herein used interchangeably, shall mean the gross

receipts from business less such of the following costs as may have been incurred in the conduct of such business:

(1) All taxes and any other fees or exactions by governmental authority other than taxes on or measured by net income;

(2) All amounts paid to any business the income from which is subject to the provisions of this act or would be so subject if it proceeded or accrued from business conducted in the state of Michigan, or to any person or government expressly exempted from the provisions hereof, for the acquisition or use of property, services, privileges or facilities for the purpose of carrying on the business, except capital assets;

(3) Interest and rents paid and a reasonable allowance for depreciation or amortization of real property: Provided, That if the total of the deductions provided in this subdivision (1) does not constitute at least 50% of the gross receipts proceeding or accruing from the business of the taxpayer, the adjusted receipts of such taxpayer shall, for the purposes of this act, be taken to be 50% of such gross receipts: Provided further, That whenever the payroll of a person subject to the tax under this act exceeds 50% of the gross receipts of such person, then an additional deduction of 10% of the gross receipts of such person, or ½ of such excess, whichever is smaller, may be deducted in addition to the basic 50% deduction, the term payroll as used in this proviso including only the wages or compensation paid to others.

* * * * * *

Sec. 2. There is hereby levied and imposed upon persons engaging in business in Michigan, a specific tax on income at the following rates:

* * * * * *

(b) Six and one-half mills on the adjusted receipts of all taxpayers other than public utilities derived from or attributable to Michigan sources.

The adjusted receipts of a taxpayer derived from or attributable to Michigan sources shall be determined in accordance with the provisions of section 3 of this act.

Sec. 3. The adjusted receipts of a taxpayer derived from or attributable to Michigan sources shall be taken to be:

• • • • •

(b) In the case of adjusted receipts of a taxpayer who conducts business transactions (other than transportation services) which take place partially within and partially without this state, the adjusted receipts of such taxpayer derived from or attributable to Michigan sources as shown by the formulae hereinafter provided in this subparagraph (b), or at the option of the taxpayer, by separate accounting methods acceptable to the department. Where the taxpayer shall so elect or where separate accounting does not properly and fairly indicate the adjusted receipts of the taxpayer derived from or attributable to Michigan sources:

(1) The adjusted receipts of such taxpayer derived from or attributable to Michigan sources shall be deemed to be that portion of the adjusted receipts of the taxpayer obtained by applying the average of the following 3 percentages, separately computed:

A. The average value of the taxpayer's real and tangible personal property within the state during the period covered by its report, divided by the average value of all the taxpayer's real and tangible personal property wherever situated during such period: Provided, That such property value, both within Michigan and everywhere, shall include a sum equal to 8 times the gross rents paid or accurued per annum by the taxpayer during the period covered by the taxpayer's report for the use of real property: • • •

B. The total wages, salaries and other personal service compensation during such period, computed on the cash or accrual basis according to the method used for federal tax purposes, of officers and employees within the state divided by the total wages, salaries and other per-

sonal service compensation, similarly computed, during such period of all the taxpayer's officers and employees within and without the state.

C. The gross receipts of the taxpayer, similarly computed, arising during such period from:

1. Sales of its tangible personal property where deliveries or shipments are made to points within this state;

2. Services performed within this state;

3. Rentals from property situated within this state and royalties from the use of patents or copyrights within this state; divided by the total amount of the taxpayer's gross receipts, similarly computed, arising during such period from all sales of its tangible personal property, services performed, and rentals and royalties, both within and without the state.

* * * * *

Sec. 4. There shall be exempted from the tax imposed by this act:

(a) The first $10,000.00 of adjusted receipts of each person subjected to tax by this act: * * *

(b) Adjusted receipts which the state of Michigan is expressly or impliedly prohibited from taxing by the constitution of the United States of America;

* * * * *

Sec. 12. * * *

Any taxpayer aggrieved by any determination of tax liability made by the department may appeal to the state board of tax appeals from such determination under the provisions of Act No. 122 of the Public Acts of 1941, as amended, being sections 205.1 to 205.17, inclusive, of the Compiled Laws of 1948, or he shall be required to pay the amount of tax found to be due by the department and shall be permitted to bring an action in the circuit court in any county in which he transacts business, to recover the amount of tax alleged to have been unlawfully required of such person. * * *

* * * * *

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 387

ARMCO STEEL CORPORATION,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE and CLARENCE W. LOCK, Commissioner, (substituted for Louis M. Nims),

Appellees.

On Appeal from the Supreme Court of Michigan

MOTION TO DISMISS OR TO AFFIRM

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28 U.S.C.A. § 1257(2) 2

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 387

ARMCO STEEL CORPORATION,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE and CLARENCE W. LOCK, Commissioner (substituted for Louis M. Nims),

Appellees.

On Appeal from the Supreme Court of Michigan

MOTION TO DISMISS OR TO AFFIRM[1]

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees move that appellant's appeal from the judgment entered in accordance with the opinion of the Supreme Court of Michigan of April 11, 1960 (JS16a-38a) be dismissed on the following grounds:

1. It does not present a substantial federal question;

[1] Unless otherwise indicated, numbers in parentheses preceded by "JS" will refer to pages of the appellant's Jurisdictional Statement, and numbers preceded by "App" will refer to pages in the printed appendix in the Supreme Court of Michigan.

2. Appellant's case does not present a federal question; and

3. The judgment of the Supreme Court of Michigan is conclusive.

In the alternative, appellees move that said judgment be affirmed on the ground that it is manifest the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

OPINIONS BELOW

The opinions of the courts below, and references thereto, are correctly set forth by appellant (JS 1a-38a).[2]

JURISDICTION

Appellant attempts to invoke jurisdiction of this Court under 28 U.S.C.A. § 1257(2). For the reasons set forth herein, the appeal should be dismissed.

ANALYSIS OF STATUTES INVOLVED

For the purpose of this appeal appellant has correctly stated the Michigan statutes involved, being Act No. 150 of the Michigan Public Acts of 1953, as amended by Act No. 282 of the Michigan Public Acts of 1955. (Michigan Compiled Laws 1948, Vol. 5A, Part I, page 573, § 205.551

[2] Opinion of Wayne County Circuit Court Judge George C. Bowles (JS 1a-15a) and opinion of the Michigan Supreme Court reported in 359 Mich 430, 102 NW (2d) 552, (JS 16a-38a).

et seq.; Henderson Michigan Stat. Ann. Cum. Sup. § 7.557(1) et seq.)[3]

The Supreme Court of Michigan determined the operative effect of the statute as follows:

> "• • • The title announces it to be 'An act to provide for the raising of additional public revenue by prescribing certain *specific taxes on income* • • •.' The act provides that the terms 'income' and 'adjusted receipts' are used therein interchangeably and that they shall be the gross receipts from business, including sales, less specified deductions, consisting of certain costs of conducting business, or, if such deductions do not constitute at least 50% of the gross receipts, then less a 50% deduction. The definition

[3]

Prior to amendment by Act No. 282 of the Michigan Public Acts of 1955, for the period January 1, 1954 to July 1, 1955 the statute contained a sales factor apportionment formula which required the adjusted receipts or income of appellant attributable to Michigan to be determined by the ratio of Michigan receipts to total receipts.

Appellees agreed that appellant could use the Massachusetts-type formula (consisting of property, payroll and sales), as placed in the statute by Act No. 282 of the Michigan Public Acts of 1955, for the entire tax period here involved, e.g., the calendar years 1954 and 1955. In accordance with such permission, the appellant recomputed its tax for the year 1954 to be in the amount of $25,084.69, instead of $37,176.14 as obtained under the sales factor formula, and for 1955 in the amount of $47,901.96, instead of $56,544.37. Thus, the amount of tax imposed upon the appellant here in controversy is not $93,720.51, but rather $72,986.65. [The figure $95,951.71 (JS 32a) includes interest.]

An example of the computation by use of the sales factor is contained on page 3 of appellant's 1954 annual return appearing opposite page 26 of appellant's Appendix before the Michigan Supreme Court.

of 'gross receipts' includes the entire receipts from any sales, whether made in inter- or intrastate commerce. A number of exemptions from the tax are provided, including the first $10,000 of adjusted receipts, and anything which the State is expressly or impliedly prohibited from taxing by the Constitution of the United States.

"With respect to adjusted receipts or income of the business of persons engaging in any activity in Michigan a tax of 4 mills was laid on such adjusted receipts allocated to Michigan or, under later amendment [Act No. 282, Michigan Public Acts of 1955, effective July 1, 1955], 6-½ mills on adjusted receipts derived from or attributable to Michigan sources. The act, as last amended, provides that adjusted receipts derived from or attributable to Michigan sources shall be taken to be (1) the entire adjusted receipts of a taxpayer whose business transactions take place entirely within the State, but, (2) in the case of a taxpayer whose business transactions occur partially within and partially without this State, only that portion of his adjusted receipts obtained by applying thereto the following apportionment formula, viz., the average of the following 3 percentages, separately computed: (1) ratio of taxpayer's Michigan property to all of his property, (2) ratio of wages paid by taxpayer in Michigan to wages he paid everywhere, and (3) ratio of his gross receipts from Michigan sales to those obtained from sales everywhere.[4] Before the 1955 amendment a different

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[4] Michigan sales are defined as sales where deliveries or shipments are made to points within the state [Sec. 3(b) (1)C of Act No. 150, of the Michigan Public Acts of 1953, as amended (JS 42a)].

formula was applied.[5] • • •

> "This tax is part of a general scheme of State taxation of business activities in Michigan. It is a tax on Michigan activities measured, in amount, by adjusted receipts derived from or attributable to Michigan sources, which, as above noted, in the case of a taxpayer whose business transactions occur entirely within Michigan, means his entire adjusted receipts, but, if his business transactions occur partly within and partly without this State, means the sum reached by applying to his adjusted receipts the mentioned apportionment formula. It is, therefore, not a gross receipts tax. Neither is it, as hereinafter considered, a tax on the privilege of doing interstate business in Michigan." [Bracketed material added] (JS 24a-25a)

It is respectfully submitted that this construction of Act No. 150 of the Michigan Public Acts of 1953 is dictated by the specific provisions of the statute.

It is readily apparent that § 2 (the imposition section), read in conjunction with the pertinent definitions contained in § 1 (the definition section), has the effect of imposing a tax on "income" or "adjusted receipts" from any type of activity whatsoever in Michigan, so long as engaged in with the object of gain, benefit, or advantage, directly or indirectly.[6] If a person derives "adjusted receipts" or

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[5] This is the sales-factor formula referred to in footnote 3, *supra*, p 3.

[6] The imposition section of the statute, as amended by Act No. 282 of the Michigan Public Acts of 1955, effective July 1, 1955, reads:

> "There is hereby levied and imposed upon persons engaging in business in Michigan, a specific tax on income • • •:

"income" from such activity or transactions carried on only within Michigan, no apportionment is necessary and the tax is determined on the total "adjusted receipts" or "income."[7] If a person derives the "adjusted receipts" or "income" from activity or transactions carried on both within and without Michigan, the tax is determined by that portion of "adjusted receipts" or "income" attributable to Michigan sources and activity by application of a Massachusetts-type apportionment formula.[8]

The Michigan statute, then, includes in its base an apportioned part of adjusted receipts or income as defined in the statute, so long as the income or adjusted receipts flow as a result of activity, irrespective of kind or character,

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"(b) Six and one-half mills on the adjusted receipts of all taxpayers other than public utilities derived from or attributable to Michigan sources." (JS 40a)

In Section 1, subsection (e), "business" is defined as "all activities engaged in or caused to be engaged in within Michigan, whether in intrastate, interstate, or in foreign commerce, with the object of gain, benefit or advantage, * * *." (JS 39a) In turn, subsection (f) of § 1 defines "activities" to mean "sales of property, real, personal or mixed, or the performance of services, or any combination of sales of property and performances of services." (JS 39a) Subsection (i) of § 1 defines "service" or "services" to "mean and include every type of endeavor other than sales." (JS 39a) Subsection (h) of § 1 defines "sale" or "sales" to "mean and include the transfer of possession or of ownership, or both, for a consideration." (JS 39a)

[7]

Section 3, subsection (a), reads:

"In the case of adjusted receipts of a taxpayer whose business transactions take place entirely within this state, the entire adjusted receipts of such taxpayer;" [not reproduced in the Jurisdictional Statement]

[8]

Quoted at JS 41a-42a.

carried on within the state of Michigan. To read more, or to read less, than this into the statute is not warranted. Undoubtedly, the tax imposed by Act No. 150 of the Michigan Public Acts of 1953, as amended, is a tax with the broadest conceivable type of base, drawing into its orbit any income or activity that can be said to constitute a proper subject of local taxation. The law, in express terms, imposes the tax on the "income" or "adjusted receipts" of anyone, including appellant, conducting business activities within the state.

The appellant incurred the tax liability here complained of because it received approximately Ninety-one Million Dollars ($91,000,000) in 1954 and 1955 from Michigan sources, as a result of its ability to carry on substantial and varied activity within Michigan and to utilize Michigan as a market for its products.

The operative effect of the statute, as applied to appellant, is best illustrated by the following table showing the actual computation of the appellant's tax for the years involved, by application of the Massachusetts-type formula.

	1954
Total Gross Receipts	$406,696,575.08
Less Exclusions	2,307,495.81
Gross Receipts for Tax Purposes	404,389,079.27
Less Deductions	202,194,539.64
Adjusted Receipts	202,194,539.64
Allocation Percentages	3.1065[*]
Allocated Adjusted Receipts	6,281,173.37
Less Statutory Exemption	10,000.00
Taxable Balance	6,271,173.35
Tax Rate	.004
Tax	25,084.69

[*]

Average ratio which represents percentage arrived a
ment formula, as follows:

	1954	
PROPERTY FACTOR		
Michigan Property ($62,321.00) / Total Property ($300,890,139.66)	= 0.0207	
PAYROLL FACTOR		
Michigan Payroll ($109,046.55) / Total Payroll ($113,886,840.47)	= 0.0957	
SALES FACTOR		
Michigan Destination Sales ($37,429,247.45) / Total Sales ($406,696,575.08)	= 9.2032	
TOTAL RATIO	9.3196	
AVERAGE RATIO	3.1065	

	1955	
	January-June	July-December
	$303,707,453.00	$328,667,886.00
	151,853,727.00	164,333,943.00
	151,853,727.00	164,333,943.00
	2.8620[*1]	2.8620[*1]
	4,346,053.67	4,703,237.45
	5,000.00	5,000.00
	4,341,053.67	4,698,237.45
	.004	.0065
	17,364.21	30,538.54

by application of the statutory apportion-

1955

chigan Property ($63,406.00) / tal Property ($339,603,831.00	= 0.0187
chigan Payroll ($139,131.53) / tal Payroll ($154,879,869.83)	= 0.0898
chigan Destination Sales Jan - June ($29,416,162.00) July - Dec ($24,193,049.00) / tal Sales ($632,375,339.00)	= 8.4774
	8.5859
	2.8620

It is noted that the amount of tax does not vary directly with appellant's Michigan destination sales which appellant labels "interstate." [This fact alone disposes of appellant's argument that the tax is a direct tax on interstate commerce.] For the calendar year 1954, the ratio of the tax to appellant's receipts from Michigan destination sales was .000670; for the first half of 1955, .000590; and for the last half of 1955 (reduced to an equivalent rate), .000777.[9]

If the appellant's activities giving rise to its Michigan destination receipts took place entirely within Michigan, the tax would have been **$74,858.50**, instead of **$25,084.69**, for the year 1954; **$58,832.32**, instead of **$17,364.21**, for the period January 1, 1955 to July 1, 1955; **$78,627.41**, instead of **$30,538.54**, for the period July 1, 1955 through December 31, 1955; and **$212,318.23**, instead of **$72,986.65**, for the years 1954 and 1955.

The differences between these tax amounts are due solely to application of the apportionment formula. While for the years 1954 and 1955, 9.2032 and 8.4774 per cent, respectively, of appellant's total adjusted receipts or income were derived from Michigan destination sales, the formula attributed only 3.1065 and 2.8620 per cent, respectively, to Michigan for tax purposes.

It is manifestly absurd for the appellant to contend that the tax in question, as applied to the appellant, has the operative effect, and should be subject to the jurisdictional limitations of, a direct, unapportioned tax on gross receipts.

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[9]

At a rate of 4 mills, the tax for the last half of the calendar year 1955 would amount to $18,792.95, and applied to the Michigan destination receipts of $24,193,049.00 would result in a ratio of .000777. This is the manner in which the ratios were computed for the entire period.

The tax in question is as far removed from a direct tax on interstate commerce as is the traditional net income tax. Since an opposite conclusion constitutes the cornerstone of appellant's "substantial question" argument, it has failed in its effort to present a substantial question.

QUESTION PRESENTED

No proper or substantial federal question is presented.

The sole issue is:

"Is the State of Michigan prohibited by the federal constitution from imposing (by Act 150 of the Michigan Public Acts of 1953, as amended) a tax upon the "income" or "adjusted receipts" of appellant, a foreign corporation conducting local activities through employees operating at and from Michigan offices, when the appellant's "adjusted receipts" or "income" are apportioned to Michigan by a three-factor formula comprised of property, payroll and receipts?"[10]

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[10] Appellant, in its Jurisdictional Statement (JS 4) so greatly distorts the issue as to leave the reader to believe that the tax in question is imposed on or measured by (1) gross receipts (2) derived from non-Michigan sources and activities. The fact is, however, that the tax is imposed on or measured by (1) only such adjusted receipts or income (2) derived from Michigan sources. Further, appellant there indicates that its activities in Michigan are limited to mere solicitation. The fact is, however, that appellant's activities in Michigan include everything necessary and incidental to establishing and maintaining generally its position in the steel industry and to utilizing Michigan as an established and continuing market for its products. Appellant's activities in Michigan resulted in its utilization of Michigan as a direct source of $91,000,000 of gross receipts for the period 1954 and 1955. Appellant is here con-

It is respectfully submitted that inasmuch as the tax in question is not a forbidden direct tax on interstate commerce and does not tax, in whole or in part, appellant's activities and transactions outside the State of Michigan, its application in the instant case is clearly constitutional.

By their Motion to Dismiss or Affirm, appellees raise the following issues:

1. The questions presented by the appellant do not present substantial federal questions and are too unsubstantial to warrant further argument.

2. The appellant has not properly raised any federal question.

3. The judgment of the Supreme Court of Michigan is conclusive.

STATEMENT OF THE CASE

Appellees cannot accept the appellant's statement of the case (JS 5-10). Appellant would lead this Court to believe that the only activity it carries on in Michigan is mere solicitation of "interstate sales" and activities incidental to such solicitation. It is respectfully submitted that the uncontroverted facts contained in the affidavit of Thomas M. Splan and Robert F. Van Haaren (App 63a-90a), submitted in support of appellees' motion for summary judgment (App 60a-62a) and reproduced in part by the Supreme

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tending that it can carry on these activities in Michigan and derive these receipts from Michigan sources without paying any tax to the state as recompense for the protection and many benefits and privileges accorded it by the State of Michigan in connection therewith.

Court of Michigan in its opinion (App 18a-23a), clearly indicate that the appellant did carry on in Michigan in a regular and systematic manner, substantial, varied and continuous activities that do not fit appellant's label "solicitation."

These activities involve any personnel deemed necessary by appellant's management to establish and maintain appellant's position in the steel industry and to utilize Michigan as a continuing market for a substantial part of its total product, and such other activities as are deemed helpful in the over-all conduct of its business, both in Michigan and elsewhere, including activities pertaining to its wholly owned subsidiary, Armco Drainage and Metal Products, Inc.[11] This activity can in no wise be considered "solicitation" or "incidental to solicitation" in the traditional sense of these terms.

To carry out its Michigan business and activity, appellant's top executive personnel regularly make contacts there. Through the activities of these executives, there is centered in Michigan very substantial top echelon determinations which require the use of appellant's Michigan facilities and personnel. These top-level determinations are related to the company problems of negotiation of long-range steel allotments and commitments; determination of potential steel requirements of important customers; advance commitments of such customers for the continued use of appellant's products both within and without Michigan (many of the appellant's customers who have their principal offices there, such as General Motors, do business

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[11] Appellant carries on activity in Michigan by its subsidiary, which it completely controls and dominates. This subsidiary has plants located in Michigan and purchases from the appellant all the steel it fabricates.

throughout the United States and the world, where they have use for appellant's products); disposition of quality problems warranting top-level consideration because of their magnitude; future planning and projection (including determination of future sales policy, capacity and limitation of appellant's mills, etc.); and maintaining appellant's position in the steel market and in the industry, both within and without the state of Michigan (App 73a-74a).

These problems are closely related and directly concerned with the nature of the qualifications and duties of the various personnel who carry on activities in Michigan. These include the sales manager of the Detroit district office; the officer manager of the Detroit district office; salesmen and various clerical help, working under the direct supervision of the office manager; mill representatives, representing particular mills of the appellant in Michigan in regard to production, quality, and research problems; product managers, constituting specialized product representatives; operating division personnel, concerned with transporting, loading and unloading, and the packaging and wrapping of appellant's products; treasury division personnel, concerned with credits and financial arrangements; research division personnel, concerned with the development of new steel products and who follow the experimental use in Michigan and elsewhere of such products as well as new applications of existing products of appellant; and market development personnel, concerned with long-range planning and the gathering and utilization of economic data, etc.

The nature of the duties and activities of these persons in Michigan for the period in question dispells appellant's contention that it engages in no local activity constituting a proper subject of local taxation. None of this personnel directly solicits orders for appellant's products.

The district sales manager is "primarily to direct and coordinate the activities of his sales personnel in an effort to carry out effectively and efficiently Management's requests pertaining to the securing of profitable business in his territory." (App 82a) These requests, in many instances, relate to the over-all business of the appellant and involve the activities on a day-by-day functional basis of market development, research, operating, traffic, and treasury division personnel, as well as many executives. All such activities are centered, directed, coordinated, and supervised from appellant's Michigan office in Detroit, under the direct authority and responsibility of the Detroit district sales manager.

Thus, the district sales manager and those personnel working in Michigan or coming into Michigan at his request or at the request of top management implement and carry out established business practices and policies of the appellant within Michigan, to the end that appellant will be able to produce products in conformity with the detailed requirements of its Michigan customers; that appellant's Michigan customers may be kept informed of appellant's products and their availability; and that customers will place substantial orders with appellant for their steel needs on a routine and continuing basis because they have been convinced that appellant is a good and dependable continuing source for these products.

The salesmen are not "solicitors" or "drummers" in any concept of these terms. They are assigned specific territories in which existing customers are located, to serve each customer as appellant's representative. Their duties include funneling and handling all information between the appellant and the customer and finalizing with the customer any agreement, order, complaint or adjustment whatsoever. These activities, multiple in nature, disclose

the discharge of a wide range of authority and responsibility and take place before, during, and after the delivery of appellant's products in Michigan.

They gather information for, and use information and the services of, personnel from various divisions of appellant, other than the sales division, all such activities being related to the over-all business and operations of the appellant both within and without Michigan.

It is believed unnecessary for the purpose of this motion to consider in any further detail the nature of the activities of appellant's personnel in Michigan.[12]

General facts concerning appellant's activities in Michigan in part are:

1. That the activity of all of appellant's personnel in Michigan is directly related to appellant's ability to to have, establish and maintain in Michigan a market for its products. (App 74a)

2. That the activity of appellant in Michigan is not directly related to the solicitation of any particular orders for any of appellant's products. (App 72a-74a)

3. That all of the customers' orders for the appellant's products for delivery in Michigan routinely flow through the Detroit district office, with the exception of those orders from customers located in the counties served by the Chicago district office on an established

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[12]

The detailed facts pertaining to their activity in Michigan and the operations of the Detroit district office are set forth in affidavit form at pages 63a-90a of the Appendix before the Supreme Court of Michigan.

and continuing basis; and orders are not picked up by appellant's salesmen except in those instances where the salesmen may be at the customer's place of business at the particular time that an order is ready for mailing. (App 74a-75a)

4. That the appellant's personnel in Michigan process through the Detroit district office all complaints of customers located in the area serviced by such office and transmit to the customers in Michigan authorization for the adjustment and settlement of complaints. (App 75a)

5. That appellant's salesmen do not routinely solicit specific orders but spend their time in making general, routine contacts with the customers to handle specific problems or complaints and to get commitments for orders on a continuing basis and in handling complaints and problems in connection with processing orders in their offices in the district offices of appellant. (App 75a)

6. That much of the activity of the appellant in Michigan is incurred because appellant routinely furnishes steel to make a particular part and is held responsible if its product fails to make the particular part for which it was furnished. (App 75a)

7. That most of the orders received by the appellant are of a recurring nature and constitute routine reorders of steel to make a particular part in accordance with prior arrangements between appellant and its customers. (App 75a)

8. Some of the activity in Michigan takes place before the interstate movement of appellant's products, and some afterwards. (JS 23a)

On the basis of such facts, the Courts below concluded

> "* * * that in necessary result the business activities tax here reaches income-producing transactions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used since it attempts to reach only that portion which is attributable to Michigan activity, contravenes neither the due process nor commerce clauses of the Federal Constitution." (App 117a, JS 36a)

Appellant asserts that this conclusion is in direct conflict with the decisions of this Court and that, thus, a substantial federal question is presented by its appeal.

It is respectfully submitted that the facts involved in this case amply support the lower Courts' decisions, irrespective of the labels appellant would attach to either the taxing statute here involved or its activities in Michigan.

1

A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED[13]

Appellant has not presented a substantial federal question to this Court of alleged unconstitutionality of Act No. 150 of the Michigan Public Acts of 1953, as amended by Act No. 282 of the Michigan Public Acts of 1955, because:

A. The appellant has not sustained the burden of estab-

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[13] In the alternative, the federal question is too unsubstantial to warrant further argument.

lishing, either in the Courts below or in its Jurisdictional Statement, that the tax in question, as imposed on it, violates any affirmative principle of constitutional law; and

B. The appellant bases its substantial federal question argument on the following erroneous principles:

1. Appellant errs in contending that the tax in question cannot constitutionally be distinguished from a gross receipts tax.

The tax is imposed upon adjusted receipts or income attributable to Michigan by application of the Massachusetts-type apportionment formula (JS 13).[14] It is clear that the tax in question does not have the jurisdictional scope of an unapportioned gross receipts tax.

2. Appellant errs in asserting that there is no known activity that will support the tax, as in

Western Live Stock v. *Bureau*, 303 US 250, 82 L ed 823, 58 S Ct 546, **and**

B. F. Goodrich Co. v. *Washington* (1951), 38 Wash (2d) 663, 231 P (2d) 325, certiorari denied 342 US 876, 96 L ed 659, 72 S Ct 167.

In fact, the local activity of appellant in Michigan is as extensive and as comprehensive as the local activity in such cases as

B. F. Goodrich Co. v. *Washington* (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167

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[14] This is demonstrated by computation of appellant's tax in "Statutes Involved," *supra*, p 8.

U. S. Steel v. *Washington* (1957), 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of substantial federal question 358 US 46, 3 L ed (2d) 44, 79 S Ct 40

Berkshire Fine Spinning Assoc. v. *City of New York* (1959), 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86

Field, Enterprises, Inc. v. *Washington* (1956), 47 Wash (2d) 852, 289 P (2d) 1010; aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55[15]

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[15]

Nor are the activities in the instant case distinguishable in their relationship to interstate commerce from the taxable activities sustained in *International Shoe Co.* v. *Washington*, 326 US 310, 90 L ed 95, 66 S Ct 154; *East Ohio Gas Co.* v. *Tax Com.*, 283 US 465, 75 L ed 1171, 51 S Ct 499; *Coverdale* v. *Pipe Line Co.*, 303 US 604, 82 L ed 1043, 58 S Ct 736 (This case makes an exhaustive analysis of the question of separability of local activities related to commerce for purposes of state taxation); *Canton Railroad Co.* v. *Rogan*, 340 US 511, 95 L ed 488, 71 S Ct 447; *American Mfg. Co.* v. *St. Louis*, 250 US 459, 63 L ed 1084, 39 S Ct 522; *Pacific Telephone Co.* v. *Tax Commission*, 297 US 403, 80 L ed 760, 56 S Ct 522; *Utah Power & Light Co.* v. *Pfost*, 286 US 165, 76 L ed 1038, 52 S Ct 548; *Central Greyhound Lines* v. *Mealey*, 334 US 653, 92 L ed 1633, 68 S Ct 1260; *Norton Company* v. *Dept. of Revenue* (1951), 340 US 534, 95 L ed 517, 71 S Ct 377; *Railway Express Agency, Inc.* v. *Virginia* (1959), 358 US 434, 3 L ed (2d) 450, 79 S Ct 411; *Northwestern States Portland Cement Co.* v. *Minnesota* (1959), 358 US 450, 3 L ed (2d) 421, 79 S Ct 357; *West Publishing Co.* v. *McColgan*, 27 Cal (2d) 705, 166 P (2d) 861, aff'd 328 US 823, 90 L ed 1603, 66 S Ct 1378; *Memphis Gas Co.* v. *Stone*, 335 US 80, 92 L ed 1832, 68 S Ct 1475; *Interstate Pipe Line Co.* v. *Stone*, 337 US 662, 93 L ed 1613, 69 S Ct 1264; *ET & WNC Transportation Co.* v. *Currie*, 248 NC 560, 104 SE (2d) 403, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602; *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234 La 651, 101 So (2d) 70, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602.

3. Appellant errs in stating that a tax on gross receipts from interstate commerce is forbidden by the commerce clause (JS 14).

This position of appellant is contrary to the long line of decisions of this Court, from

> *McGoldrick* v. *Berwind-White Co.* (1940), 309 US 33, 84 L ed 565, 60 S Ct 388,

to date upholding the right of the state where the buyer is located and the goods delivered, to impose a gross income or receipts tax, if the receipts are a result of local activity within the taxing jurisdiction by the taxpayer, as in the instant case.[16]

This is illustrated by the factual references contained in "Statement of the Case," *supra*, pp 12-18; Hartman, Paul J., "State Taxation of Interstate Commerce," Dennis & Co., Inc., Publishers, Buffalo, N.Y., 1953, p 101, analyzes such cases as holding: "* * * Privileges closely connected with interstate commerce have been thus regarded as distinct from the commerce for purposes of taxation. * * *"

[16]

These cases include *Felt & Tarrant Co.* v. *Gallagher* (1939), 306 US 62, 83 L ed 488, 59 S Ct 376; *Graybar Electric Co.* v. *Curry* (1939), 308 US 513, 84 L ed 437, 60 S Ct 139, affirming per curiam 238 Ala 116, 189 So 186; *McGoldrick* v. *Berwind-White Co.* (1940), *supra*, 309 US 33, 84 L ed 565, 60 S Ct 388; *McGoldrick* v. *Felt & Tarrant Co.* (1940), 309 US 70, 84 L ed 584, 60 S Ct 404; *Jagels* v. *Taylor* (1940), 309 US 619, 84 L ed 983, 60 S Ct 465, affirming per curiam 280 NY 766, 21 NE (2d) 526; *Dept. of Treasury* v. *Wood Corp.* (1941), 313 US 62, 85 L ed 1188, 61 S Ct 885; *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 US 359, 85 L ed 888, 61 S Ct 586; *Allied Mills, Inc.* v. *Dept. of Treasury of Indiana, et al.* (1943), 318 US 740, 87 L ed 1119, 63 S Ct 558, affirming per curiam 220 Ind 340, 42 NE (2d) 34; *General Trading Co.* v. *Tax Commission* (1944), 322 US 335, 88 L ed 1309, 64 S Ct 1028; *International Harvester Co.* v.

These cases, in turn, are not at variance with the decisions of this Court forbidding the seller-state to subject to tax gross income or receipts from sales transactions consummated by delivery to buyers in other states as a result of local activity carried on there,

J. D. Adams Mfg. Co. v. *Storen*, 304 US 307, 82 L ed 1365, 58 S Ct 913

Freeman v. *Hewit*, 329 US 249, 91 L ed 265, 67 S Ct 274

or those cases denying the buyer-state the right to collect a tax from the seller where he does not have, within the jurisdiction, a tangible or substantive presence of a more or less permanent nature,

McLeod v. *Dilworth Co.*, 322 US 327, 88 L ed 1304, 64 S Ct 1023

Miller Brothers Co. v. *Maryland*, 347 US 340, 98 L ed 744, 74 S Ct 535

4. Appellant errs in concluding that this Court has never sanctioned the division of receipts from a sale between two states and that, therefore, irrespective of

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Dept. of Treasury (1944), 322 US 340, 88 L ed 1313, 64 S Ct 1019; *Norton Co.* v. *Dept. of Revenue* (1951), *supra*, 340 US 534, 95 L ed 517, 71 S Ct 377; *B. F. Goodrich Co.* v. *Washington* (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167; *Field Enterprises, Inc.* v. *Washington* (1956), *supra*, 47 Wash (2d) 852, 289 P (2d) 1010, aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55; *U. S. Steel* v. *Washington* (1957), *supra*, 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of a substantial federal question, 358 US 46, 3 L ed (2d) 44, 79 S Ct 40; *Berkshire Fine Spinning Assoc.* v. *City of New York* (1959), *supra*, 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86.

apportionment, the tax is invalid, either as a tax on interstate activities or the receipts therefrom (JS 15).

This conclusion overlooks (1) the basic purpose of apportionment in the first instance, e.g., to protect interstate transactions from multiple or discriminatory burdens and (2) this Court's references to apportionment in cases such as

J. D. Adams Mfg. Co. v. *Storen, supra*, 304 US 307, 82 L ed 1365, 58 S Ct 913

Central Greyhound Lines v. *Mealy, supra*, 334 US 653, 92 L ed 1633, 68 S Ct 1260

Ott v. *Mississippi Barge Line*, 336 US 169, 93 L ed 585, 69 S Ct 432

Railway Express Agency v. *Virginia* (1959), *supra*, 358 US 434, 3 L ed (2d) 450, 79 S Ct 411

Northwestern States Portland Cement Co. v. *Minnesota, supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357

Western Livestock v. *Bureau, supra*, 303 US 250, 82 L ed 823, 58 S Ct 546

As stated in *Western Livestock* v. *Bureau, supra*, 303 US 250, at pp 256, 275:

> "• • • Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state • • •.
>
> "• • • it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross

receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. * * *"

5. Appellant errs in arguing that the character of the tax as a net income tax renders the tax invalid under the due process clause because the statute does not permit the deduction of payrolls or depreciation to arrive at the tax base. (JS 17)

Appellant argues that the tax is imposed in effect on non-Michigan payrolls and property. Application of the apportionment formula to the tax base produces no such result.

As set forth above at p 10, appellant's tax in the instant case would have been $212,318.23, instead of $72,986.65, if its property and payroll giving rise to its Michigan destination receipts were Michigan properties and payrolls.[17] Furthermore, a steel company located entirely within Michigan, which produced and delivered the same amount of steel in this state as appellant for the period in question, would have been subject to a tax of $212,318.23. This alone proves the reasonableness of the formula as applied to appellant. Thus, appellant's due process argument is without substance.

In its due process clause argument, as in its commerce clause argument, appellant fails to give recognition to the fact that the tax here is imposed upon only those activities and adjusted receipts reasonably attributable to Michigan.

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[17] This is on the assumption that the relationship of Michigan destination receipts to property and payroll of appellant is the same as the relationship of appellant's total receipts to its total properties and payrolls everywhere.

by use of an apportionment formula (using the factors of physical property, payroll and sales), that has traditionally been sustained as a fair method of apportioning business income of a manufacturing concern such as appellant.[18]

Against the contention that the Massachusetts-type formula attributed net income to California, when in fact no income was earned from California sources, this Court said:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed * * *.
>
> "* * * We cannot say that property, payroll, and

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[18]

This formula, commonly known as the Massachusetts formula, has been approved by the American Bar Association, the National Tax Association, and the National Association of Tax Administrators, as stated in their joint committee report entitled "The Coördination of Federal, State and Local Taxation," at p 42:

> "It is recommended by the Joint Committee that the well-known Massachusetts formula shall generally be followed in allocating the business income of corporations and other organizations among the states in which the business is conducted. This formula is particularly applicable to manufacturing and mercantile businesses, which account for a substantial part of interstate commerce. * * *"

Such formula has been approved on various other occasions by the National Tax Association:

"Report of Committee on Standardization and Simplification of Business Taxes," 1929 Proc. Nat. Tax Ass'n 152;

"Report of Committee on Uniformity and Reciprocity in State Taxing Legislation," 1933 id. 259;

"Preliminary Report of Committee of N.T.A. on Allocation of Income," 1938 id. 486;

"Report of Committee of N.T.A. on Allocation of Income," 1939 id. 190.

sales are inappropriate ingredients of an apportionment formula. * * *"

Butler Bros. v. *McColgan*, 315 US 501, pp 507, 509 [86 L ed 991, 62 S Ct 701][19]

As stated in Jerome R. Hellerstein, "State and Local Taxation," Prentice-Hall Law School Series, p 276 (1952):

"* * * It is widely believed that these three factors [the Massachusetts formula factors of tangible personal property, payrolls and sales] ordinarily will reflect fairly the claims of the states to their respective portions of a manufacturing or vending corporation's income or receipts." (Footnote references omitted; bracketed material added)

The due process contention of appellant was thus properly disposed of by the Supreme Court of Michigan, when it stated:

"* * * a reasonable apportionment formula, provided in the statute here under consideration, ends questions of due process. * * * the tax is levied on activities

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[19]

To like effect are: *International Harvester Co.* v. *Evatt*, 329 US 416, 91 L ed 390, 67 S Ct 444; *Railway Express Agency, Inc.* v. *Virginia* (1959), *supra*, 358 US 434, 3 L ed (2d) 450, 79 S Ct 411; *Northwestern States Portland Cement Co.* v. *Minnesota*, (1959), *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357; *Ford Motor Co.* v. *Beauchamp*, 308 US 331, 84 L ed 304, 60 S Ct 273.

As stated in *International Harvester*, *supra*, 329 US 416, at p 423:

"* * * Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. * * *"

carried on within this State. The statute carefully provides that it shall be levied only on 'adjusted receipts,' 'derived from or attributable to Michigan sources.' This makes for fair and reasonable apportionment of the tax to Michigan business, Michigan activities only. To requote from *Western Live Stock v. Bureau of Revenue of New Mexico*, 303 US 250, 256 (56 S Ct 546, 82 L ed 823, 115 ALR 944):

"'Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing State.'

"When plaintiff seeks to attack the formula of apportionment as unreasonable or unfair, the distinct burden rests upon it of 'showing by "clear and cogent evidence" that it results in extraterritorial values being taxed.' Butler Brothers v. McColgan, 315 US 501, 507 (62 S Ct 701, 86 L ed 991). Such are not the facts before us, * * *." (JS 31a-32a)

As has been demonstrated above in this motion, the tax in question is one imposed upon adjusted receipts or income from Michigan activities or sources.[20] For purposes of determining its validity against due process and

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[20]

In fact, the appellant does not engage in interstate commerce in Michigan. The only interstate commerce is the transmission of goods and commodities across state lines. This is done by interstate carriers and not by the appellant. In order that this interstate commerce may take place, the appellant carries on within Michigan a continuous, systematic, and regular activity which is not related to interstate commerce but localized to the utilization of Michigan as a substantial market for its products and for other varied and miscellaneous purposes.

commerce clause objections, it makes little difference whether the tax be characterized as a direct tax on gross receipts, such as that involved in *McGoldrick* v. *Berwind-White Co.* (1940), *supra*, 309 US 33, 84 L ed 565, 60 S Ct 388, and *Norton Co.* v. *Dept. of Revenue* (1951), *supra*, 340 US 534, 95 L ed 517, 71 S Ct 377; or a tax imposed on local activities measured by such receipts, as in *Interstate Pipe Line Co.* v. *Stone*, *supra*, 337 US 662, 93 L ed 1613, 69 S Ct 1264; *Memphis Gas Co.* v. *Stone*, *supra*, 335 US 80, 92 L ed 1832, 68 S Ct 1475; *Canton Railroad Co.* v. *Rogan*, *supra*, 340 US 511, 95 L ed 488, 71 S Ct 447; *Western Live Stock* v. *Bureau*, *supra*, 303 US 250, 82 L ed 823, 58 S Ct 546; *International Shoe Co.* v. *Wash.*, *supra*, 326 US 310, 90 L ed 95, 66 S Ct 154; and the more recent cases of *Field Enterprises, Inc.*, v. *Washington* (1956), *supra*, 47 Wash (2d) 852, 289 P (2d) 1010, aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55; *B. F. Goodrich Co.* v. *Wash.* (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167; *U. S. Steel* v. *Wash.* (1957), *supra*, 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of a substantial federal question 358 US 46, 3 L ed (2d) 44, 79 S Ct 40; and *Berkshire Fine Spinning Assoc.* v *City of New York* (1959), *supra*, 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86.

Furthermore, as above indicated, the case in question has not been jurisdictionally distinguished by the appellant from the incidence and operative effect of a net income tax, upheld by this Court in

> *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357

and its companion case of

Brown-Forman Distillers Corp. v. *Collector of Revenue*, *supra*, 234 La 651, 101 So (2d) 70, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602, and

ET & WNC Transportation Co. v. *Currie*, *supra*, 248 NC 560, 104 SE (2d) 403, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602[21]

The Michigan Supreme Court determined that the tax in question, as applied to the appellant, met every test laid down by this Court in *Northwestern Portland Cement Company* v. *Minnesota*, *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357. After quoting at length from the ma-

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[21]

To the same effect are:

Bass, Ratcliff & Gretton, Ltd. v. *State Tax Com.*, 266 US 271, 69 L ed 282, 45 S Ct 82

U. S. Glue Co. v. *Oak Creek*, 247 US 321, 62 L ed 1135, 38 S Ct 499

Memphis Gas Co. v. *Beeler*, 315 US 649, 86 L ed 1090, 62 S Ct 857

West Publishing Co. v. *McColgan*, *supra*, 27 Cal (2d) 705, 166 P (2d) 861, aff'd 328 US 823, 90 L ed 1608, 66 S Ct 1378

Interstate Busses Corp. v. *Blodgett*, 276 US 245, 72 L ed 551, 48 S Ct 230

Hump Hairpin Co. v. *Emmerson*, 258 US 290, 66 L ed 622, 42 S Ct 305

Western Cartridge Co. v. *Emmerson*, 281 US 511, 74 L ed 1004, 50 S Ct 383

National Leather Co. v. *Massachusetts*, 277 US 413, 72 L ed 935, 48 S Ct 534

International Shoe Co. v. *Shartel*, 279 US 429, 73 L ed 781, 49 S Ct 380

Butler Bros. v. *McColgan*, *supra*, 315 US 501, 86 L ed 991, 62 S Ct 701

Atlantic Coast Line RR v. *Daughton*, 262 US 413, 67 L ed 1051, 43 S Ct 620

jority opinion (JS 33a-35a), the Supreme Court of Michigan specifically concluded (JS 35a-36a):

> . . . . Application of the above quoted language from *Northwestern Cement Company* to the facts here, leaves the validity of the Michigan tax undoubted. For here, as in that case, (1) there is no direct restriction on interstate commerce, (2) the tax is not imposed on persons coming into the State for a temporary purpose, such as itinerant drummers, (3) the tax is not laid on the privilege or right on engaging in interstate commerce in the State, (4) the tax does not discriminate against interstate commerce by providing a direct commercial advantage to local business, nor does it subject it to an undue burden, but, on the contrary, it is laid alike on activities in furtherance of either inter- or intrastate business, computed according to the adjusted receipts therefrom derived from or attributable to Michigan sources, (5) the tax is not a regulation of any kind, (6) the State is left to collect only through ordinary means and, hence, the tax does not compel plaintiff to pay for the privilege of engaging in interstate commerce, (7) as in *Northwestern Cement Company*, the possibility of a multiple burden from this exaction is not made to appear here, (8) this is not an ~~unapportioned~~ tax which by its very nature makes interstate commerce bear more than its fair share and, (9) what the State is exacting is a constitutionally fair demand for that aspect of interstate commerce to which this State bears a special relation. Accordingly, the tax must be held to be constitutional and valid as applied to plaintiff and its activities here. In the language of the trial judge:
>
> " 'It is our view that in necessary result the business activities tax here reaches income-producing trans-

actions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used since it attempts to reach only that portion which is attributable to Michigan activity, contravenes neither the due process nor commerce clauses of the Federal Constitution.' "

Appellant has substantiated its argument of a substantial federal question only by erroneously labeling its activity in this state "solicitation" (analogous to the type of activity in the "drummer" cases, such as *Nippert* v. *Richmond*, 327 US 416, 90 L ed 760, 66 S Ct 586) and by unsupportedly asserting that a tax on or measured by receipts from interstate commerce is invalid *per se*. The activities of appellant in Michigan (see Statement of Case, *supra*, pp 12-18, and JS 5-12) eliminate its solicitation argument.

Cases such as *McGoldrick* v. *Berwind-White* (1940), *supra*, 309 US 33, 84 L ed 565, 60 S Ct 388; *Norton Co.* v. *Dept. of Revenue* (1951), *supra*, 340 US 534, 95 L ed 517, 71 S Ct 377; *Field Enterprises, Inc.* v. *Wash.* (1956), *supra*, 47 Wash (2d) 852, 289 P (2d) 1010, aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55; *B. F. Goodrich Co.* v. *Wash.*, (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167; and *Berkshire Fine Spinning Assoc.* v. *City of New York* (1959), *supra*, 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86, establish that a state can constitutionally impose a tax on receipts from interstate sales transactions, or can measure a local activities tax by such receipts.

In the *Norton* case, *supra*, this court upheld the imposition of the retailers' occupation tax of Illinois on gross

receipts derived from sales from f.o.b.—outstate origins, to Illinois customer destinations, if the sales resulted from local sales activities.

Field Enterprises, Inc., supra, and *B. F. Goodrich Co., supra*, concerned the validity of the State of Washington's business activities tax which was measured by gross receipts derived from sales of products delivered into Washington as a result of local solicitation and sales office activities carried on there.[22]

Berkshire Fine Spinning Assoc., supra, pertained to the imposition of the city of New York's business activities tax measured by apportioned gross receipts.

The material facts in the *Field Enterprises*, *B. F. Goodrich*, and *Berkshire* cases are not distinguishable for constitutional purposes from the facts in the case at bar, for, admittedly, all of appellant's sales activity in connection with its Michigan destination sales is centered in Michigan, it is essential in order for appellant to sell its products there. Furthermore, the subjects of taxation in these cases are analogous to the tax imposed by Act No. 150 of the Michigan Public Acts of 1953, as amended, in the case at bar. This Court found that either there was no substantial federal question presented in these cases or the federal question was so unsubstantial as to not require further argument. *Field Enterprises* was affirmed per curiam; *Berkshire* was dismissed per curiam; and certiorari was denied in *B. F. Goodrich*.

It is therefore apparent that appellant poses no sub-

[22]

To the same effect is *U. S. Steel* v. *Washington* (1957), *supra*, 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of a substantial federal question, 358 US 46, 3 L ed (2d) 44, 79 S Ct 40.

stantial federal question by this appeal, even on the erroneous supposition that the tax in question is one measured by or on gross receipts from interstate sales.[23]

2.

APPELLANT'S CASE DOES NOT PRESENT A FEDERAL QUESTION[24]

The foregoing analysis of the applicable statutory and case law establishes that a proper federal question can be predicated only upon:

1. A showing by the appellant that the tax in question is imposed on the privilege of engaging in interstate commerce. Appellant attempts to make no such showing and the Supreme Court of Michigan expressly found to the contrary.

2. A showing by the appellant that the tax as applied

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[23]

In fact, even supposing that appellant's activities in Michigan are as contended by it and that the tax is a gross receipts tax, all the gross receipts cases from *Berwind-White* to date (see footnote 15, p 20) support the constitutionality of the tax.

[24]

As we view *Railway Express Agency, Inc.* v. *Virginia* (1959), *supra*, 358 US 434, 3 L ed (2d) 450, 79 S Ct 411, and *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357, it is evident that state statutes will not be declared unconstitutional by this Court for commerce clause or due process reasons unless it is affirmatively established that the tax is imposed on the privilege of engaging in interstate commerce or unless it is shown by clear and cogent evidence that extraterritorial events, receipts, activities or privileges are being taxed.

to it "is so palpably unreasonable that it violates due process." Since there is not a scintilla of evidence to establish that the tax in question unreasonably measures appellant's Michigan benefits, privileges and activities, appellant's due process argument must fail.

Irrespective of how the tax is characterized — whether as a tax on local activities, a condition precedent to doing a local business, an income tax, or a gross receipts tax — the appellant still has pointed to no fact and has cited no authority that would entitle it to any relief.

3.

THE DECISION OF THE STATE COURT IS CONCLUSIVE

This Court has held on numerous occasions that it would not disturb findings or conclusions of fact if supported by competent evidence, nor change the construction or operative effect given to states' taxing statutes if supported by the statutory language. The Supreme Court of Michigan specifically found that the operative effect of Act No. 150, Michigan Public Acts of 1953, as amended, as applied to appellant, is to subject to taxation in Michigan only adjusted receipts or income reasonably attributable to that state as a result of appellant's utilizing Michigan as a market for a substantial part of its total product and as a source of contact and information for the present and future over-all conduct of appellant's business.

The Supreme Court of Michigan specifically found that the taxing statute in question is a general statute imposed upon all persons engaged in business activities; that it is not a tax on the privilege of engaging in interstate com-

merce; and that it does not subject interstate commerce to discriminatory or multiple burdens.

It is respectfully submitted that such conclusions and findings of the Michigan Supreme Court have ample support in the record and clearly establish the lack of substance to appellant's argument.

RELIEF

It is respectfully submitted, for the reasons herein stated, that this Honorable Court should dismiss the appeal or affirm the judgment of the lower court.

Respectfully submitted,

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JAMES F. BROWN, Clerk

Supreme Court of the United States

October Term, 1960

No. 387

ARMCO STEEL CORPORATION,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE, CLARENCE W. LOCK, Commissioner, substituted for Louis M. Nigro,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 387.

ARMCO STEEL CORPORATION,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE and CLARENCE W. LOCK, Commissioner (substituted for Louis M. Nims),

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

I.

Appellees' motion seeks to dispose of the case on the merits.

Appellees' motion does no more than attempt to show that the federal questions presented are foreclosed by prior decisions of this Court.[1] It is submitted, as hereinafter demonstrated, that such is not the fact. Therefore,

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[1] There is no suggestion in Appellees' Motion to Dismiss or Affirm that the federal questions alleged by Appellant were not timely or properly raised or expressly passed upon by the Michigan Supreme Court; or that the decision of the Michigan Court rests on an adequate non-federal basis; or that the decision is sustainable on grounds other than those involved in the questions that are presented. Neither do Appellees argue that the questions presented are not important.

Appellees' motion should be denied and decision of this case on the merits made only after briefs and oral argument.[2]

II.

Introduction to argument.

Appellees' argument on the merits fails because:

(a) Appellees' claim that Appellant's activity in Michigan amounts to more than mere solicitation of orders and that numerous decisions of this Court uphold taxes on local activities and taxes on gross receipts from interstate commerce depends for its validity on an over exaggeration of Appellant's Michigan activities and citation of cases involving obviously different types of taxes and activities. This argument further demonstrates Appellees' attempt to ride two horses; *i.e. to* categorize the tax as one on activities for some purposes and as a tax on receipts for other purposes.

(b) Appellees' claim that the only issue is the constitutionality of the imposition of a tax on apportioned "adjusted receipts" or "income" of a foreign corporation conducting *local* activities, by use of meaningless words such as " income" or "adjusted receipts", ignores the constitutional issues raised in Appellant's Jurisdictional Statement. As pointed out therein, the fact is that the starting point for the computation of this tax is Appellant's receipts from all sources whether or not related to Michigan, and 50 per cent of such gross receipts are arbitrarily divided for tax purposes. Furthermore, Appellant's activities are

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[2] If the questions require analysis or exposition for their determination the motion should be dismissed. See *Wilheim v. Moffatt Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, 43 S. Ct. 694 (1923).

not local in the sense of being distinct and severable from interstate commerce.

(c) Appellees' claim that the apportionment formula prevents multiple or discriminatory burdens completely ignores the constitutional issue inherent in the fact that the base to which apportionment is applied is a forbidden one; and by so ignoring, Appellees rely on cases involving *net* income taxes, franchise taxes, or cases that allocate the entire receipts of a taxable transaction to the place where the *local* activities generate the receipts. In no case known to Appellant's counsel, and certainly in none of the cases cited by Appellees, has this Court ever passed upon the use of a three factor apportionment formula in connection with a tax of this nature nor has it ever passed upon the constitutionality of allocating receipts in the sales fraction to destination point. Appellees' apportionment argument again begs the constitutional issues here presented by assuming that there is no difference between the tax in question and other taxes such as net income or franchise taxes.

(d) It is not true that the Michigan Supreme Court conclusively determined that the statute in question had the effect of imposing a tax on "income" or "adjusted receipts" attributable to Michigan sources. As pointed out in Appellant's Jurisdictional Statement (pp. 14, 15) the Michigan Court made no clear cut finding as to the incidence of this tax and Appellees' motion itself is equivocal as to incidence; *e.g.*, "activities" (p. 5); "adjusted receipts or income" (p. 19); "activities and adjusted receipts" (p. 24).[3]

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[3] All page numbers contained in this brief and shown thus (p. .....) are references to Appellees' motion unless otherwise indicated.

(e) Appellees' claim that a federal question can be raised only by showing (1) that the questioned tax is imposed on the privilege of engaging in interstate commerce, and (2) that the measurement of the tax is unreasonable is so obviously inaccurate as to require no refutation. The same is true of the Appellees' claim that the decision of the Michigan Court as to the operative effect of this tax is conclusively binding on this Court.

III.

Appellees exaggerate the facts.

Appellees seek by over-emphasis of facts and restatement of the issues to a single issue couched in sterile and meaningless terms such as "income" and "gross receipts" to show that this case is governed by net income tax cases or in the alternative, by cases that have validated taxes on gross receipts allocable by source to local activities separable and distinct from interstate commerce. There can be no argument that the tax in question is not a net income tax, and indeed Appellees make no such argument, although they seek support from the net income tax cases.

Appellees' motion (pp. 12, 18) is devoted to a repetitious statement of alleged facts. Pages 8 through 10 are devoted to a slanted interpretation of these alleged facts. Decision in this case was entered on the pleadings without an opportunity to present evidence. Contrary to Appellees' claim (p. 12) that their statement of the case is uncontroverted fact, Appellant's affidavit of merit described the statements relied on by Appellees as "misleading" and "inaccurate".[4] Many of the allegations are obviously

[4] Certified Record, Paragraph 11 on Page 5 of Affidavit of Merits of Murray B. Wilson, in Opposition to Motion for Summary Judgment.

hearsay or matters of opinion. Whether these are facts or hearsay or Appellees' slanted interpretation of facts, there is no dispute about the following:

APPELLANT DOES NOT

(a) engage in any manufacturing or processing in Michigan.

(b) maintain any stock of goods in Michigan.

(c) conclude any contracts in Michigan.

(d) deliver any goods or transfer title to its products in Michigan.

(e) own any property in Michigan, except for office furniture of a nominal value in its sales office (on which it pays an ad valorem tax).

(f) make any sales in Michigan.

Furthermore, disregarding the exaggeration in Appellees' motion, it cannot be gainsaid that Appellant's Michigan activities determined by reference to payrolls represent less than 1/10 of 1% of its total activities and involve not more than 1/40,000 of its property.

Appellees (p. 8), by mathematical manipulation, endeavor to disprove Appellant's claim that the tax in question, as applied to Appellant, is indistinguishable constitutionally from a gross receipts tax. In their attempt to prove that there is no direct relationship between the tax imposed and gross receipts from shipments into Michigan, Appellees (p. 10) allege a difference in the ratios between tax and gross receipts for 1954 and 1955. This inaccurate allegation results from the fact that Appellees attempt to compare incomparables. The three fractions making up the formula for the 1954 computation are determined for the full calendar year. In the computation for the year 1955, the Michigan destination sales fraction is broken into two six-month periods and the fraction for

each six-month period is averaged with the full calendar year property and payroll fractions. If the tax rate of .004 is applied to the entire year for 1955 and receipts from Michigan destination sales are combined into a full calendar year in the numerator of the sales fraction so that the fraction corresponds to the same calendar year as the other fractions, the ratio for the year 1955 is .0006742 as against .0006704 for 1954, a difference of less than .000004 (4 millionths). and a difference[5] insufficient upon which to base a legal argument. There can be no serious contention that the "practical operation"[6] of the tax in question as applied to Appellant is directly related to receipts from interstate shipments into Michigan, or on payroll and property imported into Michigan, as hereafter shown. And since the tax applies whether or not there is profit it is also clear that Michigan exacts its tribute from each dollar of gross receipts, whether from shipments interstate into Michigan or wholly unconnected with Michigan.[7]

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[5] This microscopic variation results from the averaging of infinitesimal payroll and property fractions with the only fraction having any substance, namely, gross receipts from Michigan shipments over total receipts from everywhere. To say that the payroll and property fractions act to reduce the interstate sales fraction to an amount related to Michigan activity permits the tail to wag the dog.

[6] *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, 85 L. ed. 267, 270, 61 S. Ct. 246, 249 (1940).

[7] Appellees attempt to prove (p. 10) that the tax is related to Michigan activities by showing that the tax exacted would be more than three times as great if Appellant's activity took place entirely within Michigan. It is difficult to conceive of an argument more calculated to prove that the tax is not related to Michigan activities. Is it not crystal clear that if an hundredfold increase of activity and property will increase the tax only three-fold, the computation Appellees seek to sustain must perforce be taxing out-of-state activities and transactions? Equally abortive is the attempt on the same page to justify the tax on the ground that approximately 3% of adjusted receipts are subjected to the tax rate. This 3% considered in light of the uncontroverted fact that less than 1/10 of one per cent of Appellant's payroll and property are connected with Michigan reflects a thirty-fold overreaching.

IV.

The authorities cited by Appellees are not controlling of this case because they involve different activities and different forms of taxation.

Space does not permit the individual discussion of the irrelevancy of each of the cases cited by Appellees. Therefore they will be discussed by class with general comment on the irrelevancy of each class.

It is not sufficient for Appellees to say that the *activities* in the cases cited (p. 20, footnote 15) are indistinguishable from the activity in the instant case if, as is the fact, the *taxes* involved in those cases are distinguishable. For example, *B. F. Goodrich Co.* v. *Washington*, 38 Wash. 2d 663, 231 Pac. 2d 325, cert. den. 342 U. S. 876, 96 L. ed. 659, 72 S. Ct. 167 (1951), involved a tax upon the business of making sales at wholesale. The taxpayer made sales at wholesale, maintained warehouses in the taxing state and was engaged in a wholesale operation from warehouses to ultimate purchasers in the State of Washington.[8] Of equal importance, is the fact that while the instant tax deals with receipts from everywhere, the tax in *Goodrich* dealt only with Washington connected sales.

The similarity of Appellant's activities to those of the taxpayers in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, (1959), is not dispositive of present issues in view of the obvious difference of the taxes in the two cases. Comparison of activities in light of dissimilar taxes is a *non-sequitur*.[9]

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[8] Contrary to Appellees' statement, these activities are more extensive and therefore distinguishable from the activity at issue.

[9] *E.g.*, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 508 (1951); *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436 (1938).

And it is not true that Appellant's local Michigan activities are as extensive as those of the taxpayers in other cases cited at pages 19 and 20 of Appellees' motion. For example, in *Berkshire Fine Spinning Assoc. City of New York*, 184 N. Y. S. 2d 623, Appeal dismissed 361 U. S. 3, 4 L. ed. 2d 51, 80 S. Ct, 86 (1959), the taxpayer conducted some part or all of each of the functions of its entire business (except for dyeing processes) within the taxing jurisdiction. More important, in that case, contrary to the instant one, no attempt was made to apportion receipts from sales unconnected with the taxing jurisdiction. Only the receipts from sales of goods shipped into or out of the taxing jurisdiction were dealt with and even those receipts were apportioned before being subjected to tax.[10] The activities involved in *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 95 L. ed. 517, 71 S. Ct. 377 (1951) were all of the activities necessary for the maintenance of a retail outlet including stocking of inventory and all aspects of *local sales* completed in their entirety within the taxing jurisdiction.

It seems unnecessary to point out the obvious distinctions between the instant tax and use,[11] unemployment,[12] sales,[13] franchise[14] and "in lieu of" ad valorem[15] taxes or

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[10] This latter aspect of this case is discussed further at p. 10.

[11] *General Trading Co.* v. *Tax Com.*, 322 U. S. 335, 88 L. ed. 1309, 64 S. Ct. 1028 (1944).

[12] *International Shoe Co.* v. *Wash.*, 326 U. S. 310, 90 L. ed. 95, 66 S. Ct. 154 (1945).

[13] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388 (1940).

[14] *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 91 L. ed. 390, 67 S. Ct. 444 (1947).

[15] *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 3 L. ed. 2d 450, 79 S. Ct. 411 (1959).

other taxes on local activities clearly separable from interstate commerce[16] cited by Appellees in their motion as support for their position.

V.

The application of a three-factor formula does not automatically legitimize a tax.

Appellees would make the fairness of the three-factor apportionment formula the issue in this case and by showing that it has been assumed to be a fair means of apportionment in some cases avoid specific discussion of the due process issue raised by Appellant. Appellant does not rest its case on the bare question of the fairness of a three-factor formula. Whether it produces a fair result when applied to net income[17] or to capital for franchise tax purposes[18] is immaterial to the instant case where, as Appellant claims, the subject to which the apportionment is applied is a forbidden one. Nor is it a valid answer to Appellant's claim that the incidence of the tax is a forbidden one to say that because of an apportionment formula only a part of the forbidden subject is taxed.

As previously noted, this Court has never passed on the constitutionality of such a formula when applied to a

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[16] *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522 (1919) (manufacturing); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548 (1932) (generation of electricity); *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 95 L. ed. 517, 71 S. Ct. 377 (1951), (retail outlet).

[17] The unilateral approval given this formula by the tax collectors (p. 25) was in connection with allocation of net income.

[18] As in cases cited (p. 26, footnote 19) such as *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 91 L. ed. 390, 67 S. Ct. 444 (1947).

taxpayer's gross receipts from all sources. Neither has it expressly considered the constitutionality of the allocation of receipts from interstate shipments to the state of destination for the purpose of determining the sales fraction in a three-factor formula.

Appellant in this appeal challenges the constitutional power of the State of Michigan to tax Appellant's gross receipts, less fifty per cent thereof, derived from all its business wherever transacted, including substantial ($369,267,328 in 1954 and $578,766,128 in 1955) gross receipts from transactions which neither originated nor terminated in the State of Michigan and which, indeed, had no connection whatsoever with the State.

The case of *Berkshire Fine Spinning Assoc.* v. *City of New York*, 184 N. Y. S. 2d 623, Appeal dismissed, 361 U. S. 3, 4 L. ed. 2d 51, 80 S. Ct. 86 (1959), and one of the cases upon which Appellees' motion principally relies[19] exposes the fallacy of reliance on the apportionment formula as the saving grace of the tax here in issue. In the first place, *Berkshire* expressly left open the question of the fairness of the allocation formula. More important, in that case the taxing authorities apportioned only receipts from goods shipped into or out of New York.[20] There the tax computation employed a category designated as "non-allocable" or "non-taxable" receipts, i.e., receipts from sales transactions where both the shipping and delivery of the goods

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[19] Cited 5 times in Appellees' motion.

[20] Both *Field Enterprises, Inc.* v. *Washington*, 47 Wash. 2d 852, 289 Pac. 2d 1010, aff'd 352 U. S. 806, 1 L. ed. 2d 39, 77 S. Ct. 55 (1956) and *B. F. Goodrich Co.* v. *Washington*, 38 Wash. 2d 663, 231 Pac. 2d 325, cert. den. 342 U. S. 876, 96 L. ed. 659, 72 S. Ct. 167 (1951) cited frequently by Appellees dealt only with receipts from Washington sales. Appellees' reliance on these cases reflects a refusal to recognize the difference between these taxes, which deal only with receipts related to the taxing state (in fact allocated to the source), and the scope of the Michigan tax where the starting point is receipts from everywhere and which extracts a tribute from every gross receipts dollar.

took place outside of New York. Before attempting to determine the receipts subject to tax, these non-allocable or non-taxable receipts were eliminated. No attempt was made to allocate receipts from sales wholly unconnected with New York.

The argument was strenuously made in the Michigan Supreme Court that the plain language of the Michigan Statute apportions only those receipts derived from Michigan activity. That argument was rejected and it was held that the intention was to apportion receipts from all sources, whether or not connected with Michigan.

VI.

This appeal does present substantial federal questions that merit the consideration of this Court.

Appellant submits that because of the particular relationship of the parties, the tax in this case produces forbidden results; that because the subject apportioned is a forbidden subject, the apportionment formula will not save the tax; that in practical operation, as applied to Appellant, the tax is indistinguishable from a gross receipts tax and therefore is a direct burden on interstate commerce; and finally, that the attempt by the State to subject to apportionment 50% of gross receipts from sales unconnected in any way with the State of Michigan is an unconstitutional exercise of the State's taxing authority forbidden by the due process clause.[21]

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[21] Appellant does not contend, as claimed by Appellees (p. 11), that it can carry on Michigan activities and derive receipts from Michigan sources without paying any taxes to recompense the State for the protection, benefits and privileges accorded by it. The issue is not whether the State can impose a tax on Appellant. Rather the issue is whether the State can impose this particular tax on Appellant in the manner and amount complained of. Appellant pays without argument ad valorem property taxes levied on its property in Michigan.

Briefly stated, authority supporting Appellant's position as outlined in the preceding paragraph includes:

(a) Appellant's activities within the State of Michigan are integral and inseparable incidents of interstate commerce.[22] Solicitation of orders for sale of goods is part and parcel of interstate commerce.[23] That Appellant's method of soliciting business is more elaborate than door to door solicitation has no constitutional significance.[24] The maintenance of a local office does not change the interstate character of the activity.[25]

(b) Taxes on gross receipts from interstate commerce are forbidden direct taxes.[26] The effect, except for the

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[22] The decision of the Michigan Court is not contrary to this statement.

[23] *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694, 7 S. Ct. 592 (1887); *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424 (1952).

[24] *Nippert* v. *City of Richmond*, 327 U. S. 416, 90 L. ed. 760, 66 S. Ct. 586 (1946); *General Trading Co.* v. *Tax Comr.*, 322 U. S. 335, 88 L. ed. 1309, 64 S. Ct. 1028 (1944).

[25] *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, 62 L. ed. 632, 38 S. Ct. 295 (1918); *Ozark Pipeline Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184 (1925); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357 (1959); *Williams* v. *Stockham Valves & Fittings, Inc.*, 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357 (1959).

[26] *State Freight Tax Cases*, 15 Wall. 232, 21 L. ed. 146 (1872); *Fargo* v. *Michigan*, 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857 (1887); *New Jersey Bell Tel. Co.* v. *Tax Board*, 280 U. S. 338, 74 L. ed. 463, 50 S. Ct. 111 (1930); *Pullman* v. *Richardson*, 261 U. S. 330, 67 L. ed. 682, 43 S. Ct. 366 (1923); *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 67 L. ed. 1095, 43 S. Ct. 643 (1923); *Railway Express Co.* v. *Virginia*, 347 U. S. 359, 98 L. ed. 757, 74 S. Ct. 558 (1954); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 91 L. ed. 993, 67 S. Ct. 815 (1947); *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274 (1946); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913 (1938); *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608 (1936); *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 32 L. ed. 229, 8 S. Ct. 1127 (1888); *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 88 L. ed. 1304, 64 S. Ct. 1023 (1944).

amount, of a tax on 30% of gross receipts is indistinguishable legally from a tax on total gross receipts. One cannot examine the figures relied on by Appellees (pp. 8-9) without being struck by the fact that the dominant element, in fact the only significant figures, are gross receipts. The starting point of the computation is gross receipts from everywhere. The numerator of the dominant fraction in the apportionment formula is gross receipts from shipments into Michigan, and the denominator of that fraction is gross receipts from sales and shipments everywhere.

> "* * * a tax is as much a tax on the measure as it is a tax on the so called subject. A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."[27]

(c) Apportionment does not avoid the basic unconstitutionality of the tax.[28]

(d) There is no sanction in the decisions of this Court for apportionment of receipts in the manner attempted by the statute in question. The commentators in the field conclude that such apportionment is not possible.[29] Justice Black's dissent in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 327, 82 L. ed. 1365, 1378, 58 S. Ct. 913, 923 (1938), contains the unequivocal declaration that a state lacks power to apportion gross receipts from interstate commerce.

(e) Seldom before in its history has this Court been faced with such a bold and extensive legislative scheme to

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[27] *Professor Elvin E. Overton*, U. of Tenn. Law College, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242, Winter '60.

[28] *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218 (1912).

[29] *Powell*, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev. 710, 743; *Altman & Keesling*, Allocation of Income in State Taxation (2d ed. 1950), Par. 25, 26.

reach out beyond a state's boundaries to tax activities having neither "nexus" nor even a remote connection with it.

It is recognized that the sales factor in an apportionment formula is a convenient device for shifting taxes.[30] But the sole function of an apportionment formula should be to determine objectively what values lie within the permissible scope of a state's taxing power.

Michigan, for purposes of its gross receipts type tax, seeks to import into its taxing jurisdiction a portion of each dollar of Appellant's receipts from all sources by use of an apportionment formula which combines such unrelated and dissimilar factors as property and payroll with gross receipts from all sales everywhere. An apportionment formula using in-state property and payroll measures receipts allocable to those activities for tax purposes to recompense the state for the benefits enjoyed by those activities. This case does not involve Michigan sales, so that no claim can be made that the shipments into Michigan reflect either Michigan receipts or Michigan activity beyond that reflected by the payroll and property factors. By no stretch of the imagination can apportionment on the basis of receipts from out-of-state shipments to points within the state be considered to be anything but the impor-

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[30] "An analysis of the statutes and regulations of the states employing such corporate taxes reveals eleven different formulas, which are composed of one or a combination of eight different factors. The substantial lack of uniformity in the provisions has apparently resulted because of the desire of each state to devise a formula and define the factors included therein in a manner most advantageous, taxwise to itself." *Hartman*, State Taxation of Corporate Income, 13 Vand. L. Rev. 21, 65.

"The most vexatious problems in connection with the apportionment factors lie in these varying definitions of the 'sales' factor. Here is to be found the largest source spring for multiple taxation." *Ibid*, at p. 74.

See *Rhinelander & Wollen*, note State Taxation of Interstate Commerce, 46 Va. L. Rev. 297, 320, showing how varying definitions of the sales factor can result in multiple taxation of income.

tation into the state of extraterritorial values. Such receipts can have no additional relation to Michigan because of the bare fact of shipment into the State. Apportionment by fractions representing Michigan payroll and property have already fully utilized the only in-Michigan activities and in-Michigan aspects related to shipments into the State to which Michigan can extend its privileges, protection and benefits. Consequently, there is no more in-state activity to be reflected by the so-called sales factor. This factor constitutes plainly and simply the taxation of receipts earned outside the territorial boundaries of Michigan by capital and labor employed outside that state.

When it is recognized, as it must be, that if Appellant had no activity in Michigan the state could not tax any of Appellant's receipts merely because of shipments into the State, the gross unreasonableness of taxing millions of its dollars just because 1/10th of 1% of its payroll and 1/40,000 of its property is located there becomes apparent.

Simple arithmetic makes it self-evident that the tax, using the arbitrary 50% deduction, is imposed on extra state values if it is compared with a tax computed by deducting expenses and costs attributable in fact to activities actually taking place outside of Michigan (including payroll and depreciation on personal property). This latter computation produces a tax of $6,360.00 in round numbers for the year 1954. This is a graphic demonstration that the assessed tax of $25,084.00 for 1954 contains over $18,000.00 attributable to out-of-Michigan activities (payroll) and property. A corresponding situation prevails in respect to the 1955 tax.

In light of these figures, any argument that the tax is a fair exaction for the benefits and protection afforded by Michigan misses the mark, for Michigan affords no benefits or protection to the employment function reflected by non-Michigan payroll or by property outside Michigan. And, as

demonstrated above, the payroll and property factors reflect completely the receipts or activities related to the shipments into Michigan.

Rather than the "scintilla of evidence" of unreasonableness which Appellees' motion demands, Appellant submits that the apportionment formula is so palpably unfair and unreasonable on its face that it requires no proof.

Conclusion.

Space at this stage of the proceedings will not permit full elaboration of reason and authority supporting Appellant's position. This is more properly left to briefs on the merits and oral argument and it is respectfully requested that Appellant be given opportunity to submit such briefs and argument.

For the reasons above stated, Appellees' Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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